UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NSL COUNTRY GARDENS, LLC

and

NEW ENGLAND HEALTHCARE EMPLOYEES UNION 1199

and

KATHERINE MINYO, an Individual

Cases 01–CA–223025
01–CA–223397
01–CA–223565
01–CA–224038
01–CA–229386
01–CA–230066
01–CA–231797
01–CA–231850

Daniel Fein and *Catherine Terrell, Esqs.*,
for the General Counsel.
Thomas Posey, Esq.,[1]
for the Respondent.
Kevin Creane, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel alleges that in 2018, Respondent NSL Country Gardens, LLC (Respondent) committed an assortment of violations of the National Labor Relations Act, including (but not limited to): modifying the provisions of one of its contracts with the New England Healthcare Employees Union 1199 (the Union); unilaterally offering and paying bonuses to employees for covering shifts that needed to be filled on short notice; making coercive statements about employee wages; withdrawing recognition of the Union; and disciplining and/or discharging individuals who served as union delegates.

As explained below, I have found that Respondent committed several unfair labor practices, including unlawfully withdrawing recognition of the Union when the decertification petition that Respondent relied on as its basis for withdrawing recognition was tainted by serious unremedied unfair labor practices that Respondent committed in the 4–5 months before the decertification petition was circulated, and when collective-bargaining agreements for two bargaining units were still in effect.

[1] Initially, Respondent was represented by Aaron Schlesinger and Shannon Azzaro, Esqs. However, on December 18, 2018, Mr. Schlesinger and Ms. Azzaro withdrew as counsel, and Respondent's current attorney took over as new counsel.

STATEMENT OF THE CASE

This case was tried in Boston, Massachusetts, on: December 11–13, 2018; February 4–7, 2019; February 26–March 1, 2019; and April 24–26, 2019. The Union filed the following unfair labor practice charges at issue:

Case[2]	*Charge Filing Date*
01–CA–223025	June 27, 2018 (amended on August 27, 2018)
01–CA–223397	July 9, 2018 (amended on July 26, 2018)
01–CA–223565	July 12, 2018 (amended on October 30, 2018)
01–CA–224038	July 19, 2018 (amended on October 30, 2018)
01–CA–229386	October 17, 2018
01–CA–230066	October 29, 2018 (amended on November 19, 2018)
01–CA–231797	November 29, 2018
01–CA–231850	November 28, 2018

On September 25, 2018, the General Counsel issued a consolidated complaint covering Cases 01–CA–223025 and 01–CA–223397. (GC Exh. 1(aa).) On November 21, 2018, the General Counsel issued an order further consolidating cases into the complaint, thereby by adding Cases 01–CA–223565, 01–CA–224038, 01–CA–229386 and 01–CA–230066. (GC Exh. 1(dd).) Finally, on February 4, 2019:

(a) the General Counsel issued a third consolidated complaint covering Cases: 01–CA–223025; 01–CA–223397; 01–CA–223565; 01–CA–224038; 01–CA–229386; 01–CA–230066; and 01–CA–231797 (see GC Exh. 50); and

(b) I granted the General Counsel's request to consolidate the complaint in Case 01–CA–231850 (issued on January 31, 2019, see GC Exh. 87) with the other complaint(s) in this case. (Tr. 601–606.)

In the consolidated complaints underlying this case, the General Counsel alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by:

(a) Since about January 26, 2018, promising to pay its employees time and one half or double time to cover open shifts and/or callouts, in order to influence employees to reject the Union as their bargaining representative;

(b) In about late May 2018: telling per diem employees that if they took a regular position with Respondent, they would keep the higher wage rate Respondent provided to per diem employees; instructing employees to ignore what union delegates said

[2] The General Counsel also alleged, in Case 01–CA–224658, that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Kelly Sherman on or about July 27, 2018. On July 11, 2019, I approved a non-Board settlement executed by Sherman, the Union and Respondent, and granted a joint motion by the parties to sever Case 01-CA-224658 from this litigation and remand it to the Acting Regional Director for further processing consistent with the terms of the non-Board settlement.

about wage rates; and instructing employees that they should not be discussing wage rates;

(c) In about mid to late June 2018, promising employees that they would receive pay raises once the Union was removed as their bargaining representative;

(d) In about late June or early July 2018, threatening employees with unspecified reprisals because employees signed both a document in support of removing the Union as their bargaining representative and a document in support of the Union;

(e) Between about June 2018 to July 6, 2018: soliciting employees to decertify the Union by promoting and encouraging them to collect employee signatures to support removing the Union; and providing more than ministerial assistance to employees in helping them remove the Union;

(f) On or about June 29, 2018, telling employees (via memorandum) that the Union demanded that Respondent reduce the wage rates of new hires and rescind recently implemented wage increases for existing employees;

(g) About early July 2018, including on or about July 2 and 6, 2018, engaging in surveillance of employees in engaged in union activity, and engaging in surveillance of employees in order to prevent them from engaging in union and other concerted activity; and

(h) Suspending (on about July 16, 2018) and discharging (on about July 19, 2018) supervisor Katherine Minyo because Minyo refused to commit an unfair labor practice.

The General Counsel also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by taking the following adverse employment actions against certain employees because they assisted the Union and engaged in concerted activities, and to discourage other employees from engaging in these activities:

(a) Suspending (on about July 9, 2018) and later discharging (on about July 11, 2018) employee Stephanie Sullivan;

(b) Suspending (on about July 16, 2018) and later discharging (on about July 19, 2018) employee Karen Hirst; and

(c) On about November 14, 2018, issuing a final written warning to employee Dawn Nunes, and transferring Nunes to the facility's West Wing.

The General Counsel further alleged that Respondent failed and refused to bargain collectively and in good faith with the Union within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) of the Act by taking the following actions without the Union's consent and without first notifying the Union and affording an opportunity to bargain:

(a) Since about January 26, 2018, failing to continue in effect all terms and conditions of employment in the collective-bargaining agreement for Unit B,[3] by hiring new employees in Unit B at wage rates above those set forth in the collective-bargaining

[3] Unit B includes "[a]ll full time and regular part time Licensed Practical Nurses, Nurses Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees, and Laundry Employees." (Jt. Exh. 1 (Article 1.1(A)).)

agreement, without paying existing employees with the same or greater experience a wage at least equal to the wage paid to the new hires;

(b) Since about January 26, 2018, changing the manner in which it offered employees in Unit A[4] and Unit B the opportunity to work open shifts and/or call-outs; and

(c) Since about January 26, 2018, changing the manner in which it paid employees in Unit A and Unit B for working open shifts and/or call-outs, by paying employees who did so time and one-half or double time.

Finally, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Since about January 26, 2018, bypassing the Union and dealing directly with employees in Unit A and Unit B by paying employees time and one-half or double time for working open shifts and/or call-outs;

(b) Since about June 12, 2018, failing and refusing furnish the Union with information that the Union requested about the starting wage rates of all bargaining unit employees;

(c) Since about June 20, 2018, failing and refusing to furnish the Union with information that the Union requested about the hourly wage rates of all bargaining unit employees;

(d) On or about July 6, 2018, withdrawing recognition from the Union as the exclusive collective-bargaining representative of Units A and B; and

(e) In about late June or early July 2018, bypassing the Union and dealing directly with employees in Unit A and Unit B by soliciting employees to resign from Respondent and from the Union, by encouraging the employees to sign a document in support of removing the Union from the facility, and by encouraging them to enter into individual employment contracts with an agency that would be affiliated with Respondent.

Respondent filed timely answers denying the violations alleged in the consolidated complaints.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[4] Unit A includes "[a]ll full time and regular part time Registered Nurses." (Jt. Exh. 2 (Article 1.1(A)).)

[5] The transcripts in this case generally are accurate, but to the extent that I identified transcript corrections during my review of the record, I have noted those corrections in Appendix B to this decision.

Regarding the exhibits in the record, I note that on February 27, 2019, I instructed the parties to file corrected versions of certain exhibits to redact confidential information. Pursuant to that instruction, the parties submitted the following corrected exhibits: GC Exhs. 61(e)–(f). I have replaced the original copies of those exhibits in my exhibit file with the corrected versions. To the extent that the electronic file may still contain both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits remain confidential.

Finally, I hereby accept Joint Exhibit 30 (a floor plan of Respondent's facility) into the evidentiary record. Since the exhibit was not available on the last day of trial, the parties provided the exhibit to me via email on the day that they submitted their posttrial briefs. (See Tr. 2585–2587, 2589.)

FINDINGS OF FACT[6]

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business in Swansea, Massachusetts, engages in the business of operating a residential health care facility. In operating its Swansea facility, Respondent annually derives gross revenues in excess of $100,000, and annually purchases and receives goods at the facility that are valued in excess of $5,000 and come directly from points outside the Commonwealth of Massachusetts. Respondent admits, and I find, that Respondent is: an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and a healthcare institution within the meaning of Section 2(14) of the Act. (GC Exh. 1(dd), (ff).) Respondent has stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (Jt. Exh. 11.)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. NSL Country Gardens Skilled Nursing and Rehabilitation Center

In or about July 2016, Respondent began operating Northern Senior Living (NSL) Country Gardens.[7] The Country Gardens facility has two separate wings, with the West wing serving up to 43 Alzheimer's, dementia and psychiatric patients in a lockdown unit, and with the East wing serving up to 43 residents in a rehabilitative unit.[8] The facility's lobby and administrative offices are located between East and West wings. (Tr. 302, 381, 501–502, 880, 943, 1090–1092, 1648, 1727; Jt. Exh. 30.)

For most of 2018, Jamie Belezarian served as Respondent's facility administrator and was the point of contact for most, if not all, communications and negotiations with the Union. The specific managers during that time period were:

Joe Veno – Regional VP of Operations
Jamie Belezarian – Facility Administrator
Heather Perry – Director of Nursing
Katherine Minyo – Assistant Director of Nursing (until discharged on July 19, 2018)
Cassandra (Cassie) Sousa – Staff Development Coordinator
Mallory O'Kane – Minimum Data Set (MDS) Coordinator

(Tr. 71–72, 129–130, 179, 228, 232, 300–301, 433–434, 505, 540, 819, 945, 1129, 1457–1458, 1568–1570, 1630, 1671–1672, 1726–1727, 1730–1731, 1955, 2038–2039, 2047, 2069, 2212,

[6] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[7] Several other employers preceded Respondent in operating the Country Gardens facility, which has been open for at least 47 years. (Tr. 501–502, 942, 1207.)

[8] I use the terms "patient" and "resident" interchangeably in this decision.

2228, 2230–2231, 2366, 2368, 2456, 2514; GC Exh. 60(a); see also GC Exhs. 50 (par. 6(a)), 89 (par. 6).)

By about November 2018, Respondent's management changed, such that the following individuals were in the positions noted:

> Joe Veno – Regional VP of Operations (but also Interim Facility Administrator)
> Jamie Belezarian – VP of Quality Initiatives
> Cassandra (Cassie) Sousa – Director of Nursing
> Heather Perry – Assistant Director of Nursing and Staff Development Coordinator
> Mallory O'Kane – Minimum Data Set (MDS) Coordinator

(Tr. 62, 431, 1129–1130, 1568, 1570, 1630, 1671–1673, 1826, 1834–1835, 2036–2037, 2047, 2069, 2212, 2228, 2230, 2366, 2368, 2432–2433, 2447, 2456.)

2. The New England Healthcare Employees Union 1199

Since about 1984, the New England Healthcare Employees Union 1199 has served as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit at what is now Respondent's Country Gardens facility:

> All full-time and regular part-time Licensed Practical Nurses, Nurses Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees and Laundry Employees.[9] [Hereafter, I refer to this unit as the service and maintenance employees' unit.]

(Jt. Exh. 1 (Article 1.1(A)); see also Tr. 501.) In 2016 (after Respondent began operating the facility), Respondent and the Union negotiated and executed a successor collective-bargaining agreement that was effective from November 1, 2016, to October 31, 2018. In the agreement, Respondent explicitly recognized the Union as the exclusive collective-bargaining representative of employees in the service and maintenance employees' bargaining unit. (Jt. Exh. 1; id. (Article 1.1(A)); Tr. 502–503.)

In or about 2015, the Union became the exclusive collective-bargaining representative of employees in a separate, appropriate bargaining unit at the facility, described as follows:

> [A]ll full time and regular part time registered nurses.[10]

[9] The following employees are excluded from this bargaining unit: "all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act." (Jt. Exh. 1 (Article 1.1(B)).)

[10] The following employees are excluded from this bargaining unit: "all other Employees, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act." (Jt. Exh. 2 (Article 1.1(B)).)

(Jt. Exh. 2 (Article 1.1(A)); see also Tr. 502.) Respondent and the Union negotiated and executed an initial collective-bargaining agreement that was effective from November 1, 2016, to October 31, 2018. In the agreement, Respondent explicitly recognized the Union as the exclusive collective-bargaining representative of employees in the registered nurses' (RN) bargaining unit. (Jt. Exh. 2; see also id. (Article 1.1(A)).)

Union organizer Linda Teoli began working with the service and maintenance employees' bargaining unit at Country Gardens in about 2005, and began working with the RN bargaining unit in or about 2015. While Teoli serves as the primary point of contact for the Union in its interactions with Respondent and makes any final decisions for the Union, she is assisted on-site by employees of Respondent who also serve as union delegates and (among other things): communicate with union members; communicate with Respondent's management; participate in contract negotiations; and represent union members in grievance proceedings. During the time period relevant to this case (primarily 2018), the following employees served as union delegates: Donna Brown (CNA); Phyllis Gomes (LPN); Karen Hirst (LPN); Dawn Nunes (RN); Viola Rego (CNA); and Stephanie Sullivan (CNA). Unlike Teoli, union delegates did not have the authority to agree to changes to the terms and conditions of employment stated in the collective-bargaining agreements. (Tr. 432, 499–502, 505–506, 703–705, 727–728, 786, 862, 880–883, 930–932, 934–937, 945–947, 1062–1064, 1189–1191, 1207–1208, 1236–1237, 1260–1261, 1264–1266, 2236–2237; see also Jt. Exh. 9.)

B. Overview of Job Duties (RNs, LPNs and CNAs)

In general, staff at the facility work the following shifts: 11 p.m. to 7 a.m.; 7 a.m. to 3 p.m.; and 3 p.m. to 11 p.m. Two nurses and four CNAs are assigned to work on each wing during the 7 a.m. to 3 p.m. and 3 p.m. to 11 p.m. shifts, while one nurse and two CNAs are assigned to each wing for the overnight shift. Nurses and CNAs typically receive one 30–minute lunch break and one 15–minute break per 8-hour shift. (Tr. 381–382, 431, 943, 1090, 1100, 1342, 1344, 1455, 1795, 1839, 1985.)

On each wing of the facility, the RN and/or LPNs on duty oversee the care of the residents that they are assigned (about 20 residents per nurse, except for the overnight shift, when each nurse will have about 40 residents).[11] As part of that responsibility, the RNs/LPNs (among other things): assign CNAs to residents; ensure that CNAs carry out their job duties; administer medications; assess and monitor the health status of the residents; communicate with doctors; stock nurses' carts; and respond to any issues that arise with the operation of the facility (such as notifying the appropriate person if equipment or other items require maintenance or repair). (Tr. 381–382, 431, 943, 1089–1092, 1106, 1354, 1456–1457, 1773–1774, 1804–1805, 1819–1820, 1848–1849, 1999, 2014, 2536.)

When shifts change, the nurses going off duty provide a verbal report to the nurses coming on duty to explain the status and needs of their assigned residents. To facilitate the reporting process between nurses who are starting and ending their respective shifts, nurses

[11] RNs do not oversee the work of LPNs – instead, nurses in those positions have the same job duties at the facility. (Tr. 1090.)

arrive 15 minutes before the start of their shift and leave approximately 8 minutes after their shift (such that a nurse working the 7 a.m. to 3 p.m. shift would arrive at 6:45 a.m. and leave at 3:08 p.m.). (Tr. 1091, 1096–1102, 1104, 1237–1239, 1347–1348, 1366–1368, 1456–1457, 1820, 1856–1857, 1874–1875, 1880, 2014–2015.)

CNAs also provide direct care to residents by assisting residents with (or doing altogether) activities of daily living. Those activities include: accompanying residents to doctor's appointments; bathing; dressing; feeding; toileting; and transferring from one area to another. CNAs report to the nurse (RN or LPN) assigned to their "team" on the floor, and generally are responsible for 10–12 residents during their shifts (night shift CNAs are responsible for 20–24 residents). Once their assigned residents are awake, the CNAs check on them periodically, at time intervals (e.g., every 15 minutes up to every 2 hours) that depend on each resident's individual needs. CNAs generally are expected to consult with their assigned nurse before going on break, to ensure that there will be adequate coverage on the unit while the CNA is away. (Tr. 36, 68, 702–703, 784, 786, 879–880, 1368, 1456, 1804–1805, 1807, 1849; see also Tr. 2000–2001 (noting that CNAs on the night shift have a bit more flexibility on when to take breaks because residents are generally less active during that shift).)

C. Overview of Respondent's Policies, Procedures and Practices

1. Wages

The collective-bargaining agreements at issue here establish the following start rates[12] for employees:

CNAs	$11.50/hour
Dietary, Housekeeping, Laundry	$11.00/hour
LPNs	$20.50/hour
RNs	$23.00/hour

(Jt. Exhs. 1–2 (Article 5.1).) Each agreement permits Respondent to hire new employees at wages above the minimum start rate. However, if Respondent does so, then "current employees in the classification with the same or greater experience with [Respondent] shall be paid no less than the new employee." (Id. (also stating that Respondent must also notify the Union before giving any mid-term wage increases); Tr. 304–307, 507, 933, 938–939.)

2. Per diem employees

Per diem employees are employees that Respondent hires and schedules for work on an as-needed basis. Per diem employees are excluded from the bargaining unit, and thus Respondent may hire them at whatever starting rates it deems appropriate and does not have to provide them with benefits (e.g., paid time off, health benefits) under the collective-bargaining

[12] The start rates do not include "differentials" (increases to hourly wage rates) that employees may receive if they work a 3 to 11 p.m. weekday shift, an 11 p.m. to 7 a.m. weekday shift, or a weekend shift. See Jt. Exh. 1 (Article 5.3) (noting that the weekend shift differential applies from 11 p.m. on Friday to 11 p.m. on Sunday); Jt. Exh. 2 (Articles 5.3 and 5.4) (same); Tr. 76, 1466.

agreement. However, if a per diem employee "worked more than 184 hours during the previous three months and continue[s] to be normally scheduled," that per diem employee becomes a member of the bargaining unit. The collective-bargaining agreements require Respondent to notify the Union whenever it hires a new employee covered by the agreement (i.e., a new bargaining unit employee). (Jt. Exhs. 1–2 (Articles 1.2, 22.9(B)); Tr. 68–69, 117, 156, 176–177, 338, 340–341, 503–504, 616–617, 619, 1782, 2057–2058, 2249–2250, 2346.)

3. Procedure for covering open shifts and call-outs

Respondent generally expects its employees to "report for work on time and to work all scheduled hours, including required overtime." (Jt. Exh. 10 (p. 19).) However, if an employee needs to "call-out" because he or she cannot work an assigned shift, the employee should notify Respondent at least two hours before their shift begins. (Jt. Exh. 10 (p. 19); Tr. 1275, 2042–2043.) When an employee calls out, that of course creates an open shift that Respondent needs to fill. Open shifts may also occur due to staff turnover. The collective-bargaining agreements do not provide any instructions about the procedures that Respondent should use to fill open shifts. (See Jt. Exhs. 1–2; Tr. 2042–2043.)

As a matter of practice since about 2017, Respondent periodically posted a list of open shifts that employees could sign up to cover on a voluntary basis. If two or more employees signed up for the same shift on the list, then Respondent awarded the shift to the employee with the most seniority, but made an exception to seniority if Respondent could avoid or limit paying overtime by awarding the shift to a less senior employee. (Tr. 739–740, 1209.)

Respondent's practices in 2017 and early 2018 were a bit more muddled when Respondent needed to find employees to work open shifts that employees did not sign up to cover (hereafter referred to as "last-minute open shifts") and shifts that were open due to call-outs. In general, Respondent called or spoke to employees who were on or off duty until someone agreed to cover the shift (excluding any employees who would need to be paid overtime if they worked the shift). At times, Respondent contacted employees in order of seniority, but at other times Respondent contacted employees in no particular order. If Respondent could not find a volunteer to work the shift, then Respondent could resort to "mandating" an employee to work the shift.[13] (Tr. 320–321, 399–400, 465, 740, 901–902, 1209, 2042–2045; see also Jt. Exhs. 1–2 (Article 8.2) (explaining that Respondent also offered overtime shifts "on a rotating seniority basis, insofar as practicable"); Tr. 2056 (Belezarian testimony that she agreed in 2017 to offer bonuses for covering call-outs to employees in order of seniority).)

4. History of paying bonuses to employees for covering last-minute open shifts and call-outs

In a "side letter" attached to each of the collective-bargaining agreements, the parties stated as follows concerning bonuses for volunteering to work open shifts:

[13] An employee that is "mandated" must work the designated shift because their presence is necessary for Respondent to comply with government staffing requirements. Respondent mandated employees by seniority, specifically by requiring the least senior person on duty (who had not previously been mandated) to continue working and cover the open shift. (Tr. 1720–1721, 2044–2046.)

> The Voluntary Temporary Shift Pick Up Bonus shall be adjusted to $30.00 for CNAs and $60.00 for Nurses and remain in effect until January 7, 2017, at which time it shall be terminated.
>
> The Employer and Union will meet and discuss, as needed, after January 7, 2017, issues of mutual concern related to staffing.

(Jt. Exh. 1 (p. 20); Jt. Exh. 2 (p. 19).)[14]

Around Easter in 2017 (April 16, 2017), Respondent had difficulty with finding CNAs to cover open shifts created by call-outs and employee turnover. When Respondent was not able to cover the shifts by bringing in staff from a private agency or calling in per diem employees, Respondent (through Belezarian) offered CNAs time and a half as a bonus for covering the shifts (provided that the CNAs had not already worked 40 hours in the week). Employees agreed to work the shifts in exchange for the bonus, and thereafter, Respondent sporadically offered bonuses when difficulty arose with filling open shifts (particularly on weekends), with CNAs being offered time and a half and nurses being offered a paid day off (the equivalent of double time).[15] There is no evidence that Respondent notified or bargained with the Union about these bonuses, and there are no payroll records or other documents that establish when, how often, or to whom Respondent paid bonuses to cover last-minute open shifts and call-outs in 2017 and 2018.[16] (Tr. 320–321, 2049–2053, 2240–2242.)

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[14] The collective-bargaining agreements do contain a management-rights clause that states as follows:

> All rights, functions and prerogatives of the Employer are retained by and remain vested exclusively in, the Employer, except to the extent that such rights are specifically and explicitly modified by the express provisions of this Agreement. No such right, function or prerogative shall be deemed waived or modified unless the waiver or modifications [are] in writing and signed by the Employer and the Union. Without limiting the generality of the foregoing, such rights, functions and prerogatives include the right to manage the Nursing Home and direct the working forces, the right to determine the duties of Employees, the right to require standards of performance, to maintain order and discipline, and to promote efficiency, the determination of operational and other policies, the determination of methods and procedures, the assignment of work, the right to hire, transfer, promote or demote, the right to discharge, or otherwise discipline Employees subject to Article XVII, the right to lay off Employees for lack of work or for other reasons and the right to recall Employees, the right to require reasonable overtime work and the right to promulgate and enforce all rules and regulations relating to operations, employee conduct, safety measures, patient care and other matters not inconsistent with the terms of this agreement.

(Jt. Exhs. 1–2 (Article 16.1).)

[15] Respondent began offering the paid day off incentive to nurses in or about July 2017. (Tr. 2054.)

[16] Belezarian testified that: union delegates came up with the idea of paying bonuses to employees to entice them to work open shifts resulting from call-outs; union delegates received such bonus payments and helped Belezarian offer the bonuses to other employees; and that Respondent offered bonuses to employees on most weekends and at least one weekday per month after April 2017. (Tr. 2051–2053, 2055–2056, 2242–2244.) I do not credit that testimony. First, as noted above, there are no payroll

5. Discipline (up to and including discharge)

Respondent generally follows a progressive discipline system under which employees who commit infractions may receive gradually stronger forms of discipline, up to the final disciplinary steps of suspension and discharge. Disciplinary steps may include: an educational opportunity;[17] a first notice; a second notice; a final notice; a suspension; a discharge warning; and discharge from employment. (GC Exh. 34 (disciplinary action report, listing various types of disciplinary action); Tr. 1152, 2369–2371, 2509–2510.)

Notwithstanding that general approach, Respondent's employee handbook states that Respondent "shall be the sole judge of the level of discipline to be invoked and may discharge any employee without prior formal or informal methods of progressive discipline. Alternatively, [Respondent] may decide to issue oral or written warnings or suspensions without pay in lieu of termination." (Jt. Exh. 10 (pp. 23–24).)

D. November 2017 – April Birch's Initial Concerns about the Union

In about June 2017, Respondent hired April Birch as a full-time licensed practical nurse (LPN). Shortly after Birch started, union delegate Dawn Nunes provided Birch with a union card to sign, and a copy of the collective-bargaining agreement. Birch signed the union card and returned it to Nunes the next day. Birch and Nunes did not discuss any details about what it meant for Birch to be in the union. (Tr. 1341–1342, 1344–1347, 1453–1454, 1463–1465.)

In November 2017, Birch and fellow LPN Gina Picard reported to work, and were surprised to find out that some of the nurses and CNAs that were finishing the preceding shift (Gomes, Hirst, Nunes and Sullivan) were attending a union meeting downstairs in the facility. Because Nunes and Gomes were at the meeting, Birch and Picard had to wait for them to return

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records or other documents in the evidentiary record that corroborate Belezarian's testimony. Second, Belezarian gave inconsistent testimony about who gave her the idea of using bonuses in April 2017, as she initially named Palmer and Sullivan as the source of the idea, and later named Gomes, Hirst, Nunes and Sullivan. Notably, Palmer (who was not a union delegate) did not begin working for Respondent until September 2017, and thus could not have been the one who suggested the bonuses to Belezarian in April 2017. (Tr. 2050–2051, 2055–2056; Jt. Exh. 9 (identifying Palmer's hire date as September 11, 2017).) Given these inconsistencies and shortcomings, I do not find Belezarian's testimony to be credible on these points.

[17] An "educational opportunity" is essentially a training or coaching session that Respondent may give to an employee after he or she commits an infraction (the education may be verbal or may include a more formal in-service training). Respondent places the educational opportunity form in the employee's file, and if the employee subsequently commits a similar infraction, Respondent may rely on the educational opportunity form as a basis for determining what disciplinary action is appropriate for the new infraction. (Tr. 759, 1153, 1739, 1777, 2143–2144, 2370–2371, 2501–2502.) To the extent that certain witnesses testified that an educational opportunity is not a form of discipline (see, e.g., Tr. 759–760, 1153–1154, 1738–1739), I do not credit that testimony to the extent that it is contrary to established Board precedent holding that verbal warnings, coachings and reprimands are forms of discipline if they are part of a disciplinary process (e.g., a progressive disciplinary system) and lay a foundation for future disciplinary action against the employee. See *Alter Care of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565–566 (2010); *Oak Park Nursing Care Center*, 351 NLRB 27, 28 & fn. 4 (2007).

to receive their reports about the preceding shift and to obtain keys to their medication carts. When Birch, later in the evening, asked Sullivan what the union meeting was about and why it took so long, Sullivan responded that she did not need to tell Birch what the meeting was about unless she (Sullivan) felt it was necessary. (Tr. 1347–1350; see also Tr. 1351–1352 (noting that the next day, Sullivan reiterated that she did not need to report back to employees about what goes on during union meetings).)

E. January 2018 – Union Requests Information about Per Diem Employees

On January 8, 2018, Teoli emailed Belezarian to request information about the hours that per diem employees worked in the previous three months (October through December 2017). Teoli requested this information because, as stated in the collective-bargaining agreements, per diem employees become bargaining unit members if they work more than 184 hours in a three-month period. (GC Exh. 59; see also Findings of Fact (FOF), Section II(C)(2).)

Through a series of emails sent the same day, it became clear that while Respondent was supposed to send reports to the Union every quarter about per diem employee hours, Respondent had not been doing so due to a mistake by its human resources office. Teoli asked Belezarian to start sending the reports automatically, and Belezarian agreed. (GC Exh. 59; Tr. 504–506, 609–610, 639–640, 2250–2254; see also R. Exh. 5 (February 20, 2018 emails from Respondent to the Union with information about employee hire dates and per diem employee hours).)

F. January/February 2018 – Respondent Offers Bonuses for Covering Last Minute Open Shifts and Call-outs without Regard to Seniority, and Hires CNAs Chris Beauregard and Victoria Palmer at Higher Starting Wages

1. Bonuses for covering last-minute open shifts and call-outs

By January 1, 2018, Respondent was not using seniority to determine the order that it contacted employees about covering last-minute open shifts and call-outs, including occasions when Respondent offered a bonus as an incentive to cover the shift. Instead, Respondent (through Belezarian, Perry, other managers and the scheduler) would first contact employees on duty at the facility to see if they could stay for an extra shift, and then call employees on a list to see if they could cover the shift. If no employees agreed to take the shift after the first round of conversations and telephone calls, then Respondent would repeat the process but offer a bonus of time and a half as an incentive to entice an employee to work the shift. When offering the incentives, Respondent did not follow seniority, and tended to contact employees who had a track record of covering last-minute open shifts and call-outs (and thereby not contacting union delegates, who generally did not have track records of picking up those types of shifts). Belezarian and her management staff negotiated bonuses directly with employees, without any input from the Union. (Tr. 320, 496–497, 901–903, 1592–1596, 1719–1721, 1734–1738.)

2. Respondent hires CNAs at wages above the starting wage specified in the collective-bargaining agreement

On December 26, 2016, Respondent hired Chris Beauregard as a per diem CNA at a wage of $14.10 per hour. Beauregard had no prior experience as a CNA when Respondent hired

him. On or about September 11, 2017, Respondent hired Victoria Palmer as a per diem CNA at $14.10 per hour. Palmer had approximately 30 years of experience as a CNA but had not previously worked at Country Gardens. Respondent paid per diem employees at the $14.10 wage rate (which was higher than the $11.50 per hour starting rate for CNAs in the bargaining unit) because per diem employees do not receive benefits. (Tr. 176–177, 203, 2057–2059, 2232–2233, 2363–2364; GC Exhs. 2, 59 (p. 4).)

On or before February 20, 2018, Respondent hired Beauregard as a full-time CNA in the bargaining unit. Respondent also hired Palmer as a full-time CNA in the bargaining unit in February 2018 (the exact date is not established in the record). Instead of paying Beauregard and Palmer the $11.50 per hour starting wage specified in the collective-bargaining agreement, however, Respondent kept them at the $14.10 per hour rate that they had been receiving as per diem employees. Respondent did not, at this time, increase the hourly wages of any current CNAs (with the same or more experience working with Respondent) to match the $14.10 per hour starting wage rates that it paid to Beauregard and Palmer. (Tr. 176–177, 203–205, 308–309, 338–339, 1783–1784, 2060; GC Exh. 2 (indicating that CNAs Hyacinth Campbell, Stacy Hayes, Sherry Martin and other CNAs with hire dates before February 2018 each had wage rates lower than $14.10 per hour); R. Exh. 5 (email dated February 20, 2018, stating that Beauregard changed from per diem to full-time); see also FOF, Section II(K)(1), infra, (noting that on May 30, 2018, Respondent increased Campbell's, Hayes and Martin's wage rates to $14.00 per hour in an effort to match the higher wages Respondent was offering to newly hired full-time CNAs).)[18]

G. Early Spring 2018 – Birch Asks Delegates how Union Dues are Spent

In early spring 2018, Birch (separately) asked union delegates Rego and Sullivan what union dues were for and how they were being spent. Each delegate responded that the Union spent dues for various expenses, such as: contract negotiations (including travel costs and paying delegates for taking time off to attend negotiations); and attorneys' fees if bargaining unit members were fired and needed representation. Birch was not satisfied with this explanation, because she did not think union dues should be spent on employees who were fired after going through Respondent's disciplinary process, or on contract negotiations when (in Birch's view) employees ultimately only received a small raise and health insurance that was not very good. (Tr. 1370–1372, 1431, 1504–1505.)

H. April 2018 – Respondent Hires Nicole Talbot at a Higher Starting Wage

On April 21, 2018, Respondent hired Nicole Talbot as a full-time CNA at a wage of $14.00 per hour. Talbot had approximately one year of prior experience as a CNA when

[18] Respondent also hired full-time LPNs above the $20.50 per hour starting wage specified in the collective-bargaining agreement, including: April Birch (hire date July 25, 2017; starting wage $26.10 per hour); Celina Caseiro (hire date February 2, 2018; starting wage $26.00 per hour); and Gina Picard (hire date July 12, 2017; starting wage $26.00 per hour). Birch and Caseiro had limited (i.e., six months or less) prior experience working as LPNs before Respondent hired them, while Picard had two years of prior experience. The evidentiary record does not show, however, that any current LPNs with similar or more experience were paid lower wage rates than what Birch, Caseiro or Picard received when they were hired. (Tr. 306, 309, 1454, 1464–1465, 1794, 1824–1825, 1839–1840, 1866; Jt. Exhs. 1 (Article 5.1), 9).)

Respondent hired her. Respondent did not, at this time, increase the hourly wages of any current CNAs (with the same or more experience working with Respondent) to match the $14.00 per hour starting wage rate that it paid to Talbot.[19] (Tr. 305, 310–312, 338–339, 361, 1884–1886, 1888, 1914–1915; GC Exh. 2; see also FOF, Section II(C)(1).)

I. April/May 2018 – Respondent Offers Double Time to Employees who Cover Last-Minute Open Shifts and Call-Outs

By April 21, 2018,[20] Respondent began offering and paying as much as double time to employees (including, but not limited to, Palmer, Sherry Martin and Talbot) as a bonus for covering last-minute open shifts and call-outs. Respondent did not follow seniority when offering bonuses, and continued to first call employees who had a track record of covering last-minute open shifts and call-outs (and thereby not calling union delegates, who generally did not such have track records). As with the time and a half bonuses, Belezarian and her management staff negotiated these bonuses directly with employees, without any input from the Union. Although managers asked employees to stay quiet about receiving bonus payments, employees often discussed the bonuses with each other.[21] (Tr. 69–71, 178, 229–235, 274–278, 319–322, 348–350, 496–497, 740–741, 902–903, 1441, 1467, 1592–1596, 1719–1720, 1735–1738, 1916–1917; GC Exh. 43 (p. 1) (text messages between Belezarian and scheduler Kelly Sherman about offering double time on May 10, 2018); see also FOF, Section II(F)(1) (explaining that by January 1, 2018, Respondent was disregarding seniority when contacting employees about covering last minute open shifts or call-outs).)

J. May 16, 2018 – Meeting about Scheduling Practices and CNA Wage Rates

1. Ongoing scheduling issues

On April 12, 2018, Respondent hired Kelly Sherman to work as its scheduler (and also to handle other duties, such as stocking supplies and filling in as a CNA). Perry trained Sherman on Respondent's procedure for filling open shifts, including the procedure of contacting every

[19] Talbot clearly testified that she began working for Respondent as a full-time employee, and I have credited that testimony since Talbot certainly had an interest in knowing her own employment status. (Tr. 1914–1915.) To the extent that Minyo testified that Respondent first hired Talbot as a per diem employee and later converted her to full-time status (see Tr. 310–311, 361), I find that any time that Talbot was classified as a per diem employee was brief and for the administrative purpose of facilitating her hire at the $14.00 per hour wage rate.

[20] Talbot started working for Respondent on April 21, 2018, and began receiving double time for covering open shifts from the date she started work. (Tr. 1916–1917; Jt. Exh. 9; see also Tr. 178 (noting that Palmer began receiving double time by April 2018).)

[21] To avoid having the incentive payments appear on payroll documents (because Belezarian was not authorized to offer the incentives), Belezarian and her staff had employees fill out "missed punch" forms. Normally, employees fill out missed punch forms when they forget to punch in or out on the official time clock. To pay employees time and a half (or starting in April 2018, double time), Belezarian had employees fill out a missed punch form for a day they did not actually work. Thus, for example, an employee who agreed to work in exchange for an incentive would be paid for the open shift that they covered and would also submit a missed punch form for additional hours on one of their days off (thereby receiving payment for the equivalent of time and a half or double time). (Tr. 69–70, 232–233, 274–276, 319–320, 348–349.)

employee about covering the shift, without regard to seniority. (Tr. 228–230, 1735–1738; Jt. Exh. 9.)

In the same April/May 2018 timeframe, union delegates fielded complaints from some employees about not being given the opportunity to cover open shifts. In addition, union delegates were concerned that employees were circumventing the scheduling protocol altogether by making their own changes to the schedule (e.g., by informally agreeing to cover a shift that was assigned to another employee, without consulting with the scheduler). (Tr. 741, 1209.)

Eventually, Sullivan, Gomes and other employees began coming over to Sherman's desk to talk to her about the schedule and correct mistakes that they believed she was making (such as allegedly scheduling employees for shifts they did not normally work). When Sherman complained about Sullivan and Gomes to Belezarian, Belezarian responded that the schedule was none of their business, and added that they (union delegates) thought they ran the facility and that was why Respondent could not keep staff. (Tr. 239–243, 280–283; see also Tr. 243–246 (noting that on multiple occasions Sherman heard Belezarian complain that Respondent could not keep staff because of the Union), 304, 330 (noting that Belezarian told Minyo on multiple occasions that the union delegates were trying to run the building and force out management).)

2. Employee questions about bonuses

In the midst of the developing issues related to scheduling, a separate issue arose about whether LPN April Birch received a $500 bonus for covering a single 11 p.m. to 7 a.m. shift. In or about early May 2018, CNA Nickole Gaeta stopped by Respondent's human resources office and observed the following note that was facing outwards in a communication box on the human resources office door:

> HR –
>
> In addition to the 500 bonus for working 11–7, I have also not received the sign on bonus after 90 days. I started in July 2017. I know you are working on this for Gina Picard as well [-] we both started around the same time. Thank you for your help with these issues.
>
> April Birch, LPN[22]

[22] I find by a preponderance of the evidence that Birch did in fact write the note. Although Birch denied writing the note (see Tr. 1467–1468), and the note does not bear her signature (the name on the note was printed), the handwriting on the note is sufficiently similar to other examples of Birch's handwriting that are in the evidentiary record. Compare GC Exh. 33 with Jt. Exh. 29 (pp. 2–3); handwritten page headings); R. Exh. 26. Cf. *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000) (explaining that the judge may determine the genuineness of a signature on a union authorization card by comparing it to signatures on other employment documents), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). Moreover, the evidentiary record shows that Birch did receive a $1,000 bonus payment on May 11. (See GC Exh. 91; Tr. 1472–1473, 1516–1517, 2196–2197; see also Tr. 1441, 1467 (Birch admission that she did receive time and a half and double time for covering shifts when Respondent was short on staff).) Although the purpose of the bonus payment is disputed (with Respondent saying Birch receiving bonuses for signing her contract and for referring another employee, and the note saying Birch was owed a bonus for signing her contract and for working an 11 to 7 shift), the timing of the payment is consistent with my finding that

(GC Exh. 33.) Frustrated by the idea that someone would receive a $500 bonus for working an overnight shift when Gaeta and many other employees were working extra time and not receiving similar bonuses, Gaeta took a photograph of the note and texted it to Sullivan, who then shared the texted note with the other union delegates. (Tr. 78–81, 105–107, 434–435, 478, 1162.)

3. The May 16 meeting

On May 16, 2018, Belezarian asked a group of union delegates (Brown, Gomes, Nunes, Sullivan) to meet with her, Perry and Sherman to discuss scheduling procedures, since Sherman was still new to the scheduler position. Teoli was not present for the meeting because she was out on medical leave (and in any event, the meeting was impromptu in nature). At the meeting, the delegates and Belezarian agreed that when covering last-minute open shifts, Sherman should contact employees in order of seniority to see if they wished to cover the shift. (Tr. 246–248, 283–284, 434, 481, 739, 760–761, 1208–1210, 1261–1262, 1715, 2062–2063, 2186–2187; see also Tr. 509, 647–648, 2065; R. Exh. 8 (noting that Teoli was out of the office on leave starting on April 18, 2018).)[23]

Next, Belezarian advised the delegates that she wanted to work on raising CNA wage rates to $14.00 per hour, because Respondent found it difficult to hire CNAs at lower rates. The delegates responded that raising CNA wages was a great idea, but Nunes noted that Belezarian should put her plans in writing and the delegates also noted that Belezarian should negotiate with Teoli about the proposed wage increases. (Tr. 248–249, 285, 294–295, 742, 745, 761, 1210–1211, 1715–1717; see also Tr. 884, 957–958, 1212–1215 (noting that in subsequent informal discussions with Belezarian, Brown, Gomes and Hirst reiterated that Belezarian needed to negotiate with the Union about wage increases).)[24]

Birch wrote the note to remind Respondent to pay her bonus money she was owed.

With all of that stated, I emphasize that the note is relevant and probative even if someone other than Birch wrote it. At a minimum, the note had an effect on the union delegates and other employees who saw or heard about it, because it heightened their concerns that Respondent was not issuing benefits (such as bonuses) in a fair and equitable manner.

[23] After the meeting, Sherman asked Belezarian if she (Sherman) was doing okay in her job. Belezarian said that Sherman was a little slow in the beginning but was doing okay now. Belezarian added, however, that the union delegates (and particularly Sullivan) wanted Sherman fired. Based on this conversation, Sherman felt "very uncomfortable" about Sullivan and was more inclined to sign the decertification petition that circulated in June 2018. (Tr. 249–250, 256.)

[24] Belezarian and Perry testified that the delegates simply agreed on May 16 that wage rates should be increased and said nothing about any need for Belezarian to negotiate with the Union (specifically Teoli) about the proposed increase. (Tr. 1715–1717, 2062–2066.) I do not credit that testimony. As the evidentiary record shows, after the May 16 meeting the proposed CNA wage increase was still unresolved between Respondent and the Union, as indicated by the fact that Belezarian revisited the proposal informally with union delegates, and also revisited it with the Union (including Teoli) on June 12. If Belezarian and Perry were correct in asserting that the Union (through the delegates) agreed on May 16 that Respondent should proceed with raising wages, then there would have been no need for any of the subsequent communications about the issue. Moreover, when Teoli (on June 14) asserted via email that she previously said that Belezarian could speak to the delegates at any time but that Teoli would need to give the final "OK" on any decisions, Belezarian did not dispute that claim. Instead, Belezarian only

Towards the end of the meeting, Nunes asked Belezarian about the note indicating that Respondent promised to pay a $500 bonus to Birch for working an 11 p.m. to 7 a.m. shift, and noted that the delegates received multiple complaints from employees about the bonus and why it was not offered to other employees. Belezarian said that Birch was crazy and did not receive such a bonus, and suggested that Birch was referring to a bonus that employees receive when they refer a job applicant to Respondent and Respondent hires that person. (Tr. 435–436, 479–480, 743–744; GC Exh. 33; see also Tr. 479–480 (noting that the delegates did not believe Belezarian's explanation about the bonuses and later told Teoli about the issue).)

K. Late May/Early June 2018 – Growing Employee Unrest

1. Wages

In late May and early June 2018, employees (particularly CNAs) discussed and compared wages. Sullivan asked new employees what wage rate they were earning, and various CNAs expressed interest in receiving raises to $14.00 per hour, or even becoming per diem employees so they could be paid at that rate. Belezarian and Sousa assured employees that management was working on the CNA wages issue, and Belezarian added that if employees got rid of the union, that would free her hands to increase CNA wages instead of having all of the money go to union delegates. (Tr. 82–85, 113–116, 131–132, 134–135, 1887, 1926–1927; see also Tr. 115–116 (noting that Belezarian informed CNA Nickole Gaeta that Sullivan was being paid $28.00 per hour).)[25]

On May 30, 2019, Belezarian signed personnel action forms to increase the wage rates of CNAs Hyacinth Campbell, Stacy Hayes and Sherry Martin to $14.00 per hour, effective back to May 20, 2019. Belezarian made these changes in an effort to match Campbell's, Hayes' and Martin's wages to the hourly rate that Respondent was paying to per diem employees (and to employees who kept their $14.00 wage rate after changing from a per diem to a full-time employee). There is no evidence that Respondent notified or bargained with the Union before raising Campbell's, Hayes' and Martin's wage rates. (GC Exh. 96; Tr. 2060–2062, 2255–2256, 2267–2268.)

2. Frustration with the Union and union delegates

In the same time period, some employees' frustration with the Union began to emerge. One common complaint was that employees were not informed about the purpose of the Union or what it did for employees. Employees received limited information about the Union when they joined the bargaining unit, and received little if any information about ongoing union business, apart from what might be posted on the union bulletin board by the employee break room. Further, when employees asked delegates what happened at a particular union meeting, the delegates told employees that discussions at meetings were on a need-to-know basis. (Tr.

complained that Teoli did not respond to messages in a timely manner. (See GC Exh. 56.)

[25] Sullivan began working at the facility in 1983. In a form provided to the Union on June 12, 2018, Respondent indicated that Sullivan's wage rate was $21.33 per hour. (GC Exh. 2.)

216–217, 1796–1797, 1840–1843, 1878–1879, 1881, 1886–1888, 1923–1925, 1989–1990, 2019.)

Beyond the work of the Union itself, several employees believed that the union delegates were a clique and had their own rules in the workplace. Various employees maintained that the delegates were reluctant to assist newer employees with tasks at work. Sullivan was often a focal point for frustration, as employees asserted that she: disregarded the schedule for breaks set by the RN or LPN on duty and instead took breaks at times that she selected; ignored coworkers who asked for assistance; and spent time during her shift talking at the nurses' desk or talking with a former employee who occasionally visited the facility during Sullivan's shift.[26] (Tr. 133, 216, 1800–1802, 1804, 1806–1808, 1814–1815, 1829, 1833, 1847–1848, 1872, 1894–1899, 1936–1938, 1947–1948, 1991, 1998–1999; see also Tr. 1430–1431, 1505 (noting that some employees were also unhappy with the delegates because of a rumor that union delegates were not paying union dues, or were paying lower union dues than other bargaining unit members).)

LPN April Birch also complained to management about her difficulties with the union delegates that she worked with, noting (for example) that the delegates would arrive early for their shifts, but generally be unhelpful and in the way. Birch also indicated that she would prefer to come to management directly with any workplace concerns instead of going through the Union. Belezarian responded that everyone was stuck with the delegates unless they could get the Union out, and added that there were ways to get the Union out. (Tr. 313, 330, 2275, 2279–2280.)[27]

L. June 12, 2018 – Followup Meeting about Wage Rates

In about early June 2018, Belezarian approached Brown and reiterated that she was interested in raising CNA wages to $14.00 per hour. Brown explained that they should discuss the issue with Teoli. Brown subsequently contacted Teoli (who had returned to work after being out on leave), who suggested that the Union and Respondent schedule a labor-management meeting. Respondent agreed. (Tr. 509–510, 884–885; GC Exh. 55 (p. 1) (Belezarian email confirming the labor-management meeting for Tuesday, June 12, 2018); see also Tr. 510 (noting that Teoli resumed her union organizing duties on or about June 5).)[28]

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[26] Sullivan denied visiting with a former employee during her shift (see Tr. 774), but the fact remains that Sullivan's coworkers believed she was doing so.

[27] Birch answered "no" when asked if anyone from management suggested to her that she get rid of the Union. (Tr. 1518.) I do not find that Birch's general denial undermines the testimony (from Minyo and Belezarian) that I have referenced here. Simply put, Belezarian's comments about the union stopped well short of suggesting that Birch should attempt to get rid of the union. To be sure, Belezarian's remarks may have planted the idea in Birch's mind, and/or may have nudged Birch in that direction, but that was as far as things went. Birch's denial, such as it was, is fully consistent with Minyo's and Belezarian's testimony about their discussions.

[28] Manager Mallory O'Kane testified that she was present for a conversation in which Belezarian mentioned raising CNA wage rates, and Brown supported the idea and did not mention any need to negotiate with the Union. (Tr. 1656–1658.) That testimony, however, does not undermine my finding here. The evidentiary record establishes that Brown and other the union delegates told Belezarian on multiple occasions that she needed to confer with Teoli about the proposed wage increase. Belezarian did just that, by scheduling the June 12 meeting to discuss the issue directly with Teoli.

On June 12, Respondent and the Union met for a labor-management meeting, with Teoli, Brown, Gomes, Hirst and Sullivan attending for the Union and with Belezarian, Perry[29] and Veno attending for Respondent. At the start of the discussion about wage rates,[30] Teoli proposed that Respondent increase the starting wage to $15.00 per hour for CNAs, kitchen staff and dietary employees. Belezarian advised that she already increased CNA wages to $14.00 per hour and passed out a list of 31 CNAs and the wage rates that they were earning. Teoli reviewed the list and noted that the wages were "all over the place" and that, in some instances, Respondent was paying newer employees more than it was paying senior employees.[31] (Tr. 510–513, 626–629, 744–745, 956–958, 1212, 1717–1718, 2066, 2256–2257, 2265, 2373–2374, 2466; GC Exh. 2; see also Tr. 885, 1216 (noting that Brown left the meeting early to return to the resident floor).)

Upon learning of how Respondent had been handling wage rates, Teoli became very upset and directed a few choice words at Belezarian, exclaiming (for example) "are you fucking kidding me??" Teoli objected that Respondent couldn't raise wages without negotiating with the Union and working out a written agreement, and asserted that she was going to file an unfair labor practice charge with the National Labor Relations Board because Respondent unilaterally changed the wage rates. Belezarian responded by asserting that the delegates knew about the wage increases that she implemented, but ultimately dropped that line of discussion. Teoli also demanded that Belezarian provide a list of all bargaining unit members and their hourly wage rates (Teoli maintained that the list that Belezarian provided in the meeting was incomplete and included per diem employees). After taking a short break, Belezarian returned to the meeting and promised to provide an updated employee wage list to Teoli and try to figure out what might be needed to fix the wages. Teoli and Belezarian also agreed that Respondent should explore raising the wages of three senior employees to a rate over $14.00 per hour (to create more separation in pay between them and new employees), and that they should meet again in two weeks.[32] (Tr. 513–515, 564–566, 664, 744–746, 958–959, 1212, 1215, 2067, 2069–2071, 2257–2258, 2277–2278, 2362, 2376–2380, 2383, 2467.)[33]

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[29] I have given little weight to Perry's testimony about what was said in the June 12 meeting. In general, she demonstrated poor recall about the meeting, answering "I don't remember" to several questions about what was said in the meeting. (See, e.g., Tr. 1718–1719.)

[30] Earlier in the meeting, the Union and Respondent discussed an employee grievance. (Tr. 2066–2067, 2374.)

[31] For reasons that are not clear, the list did not show that Respondent had just increased the wages of Campbell, Hayes and Martin to $14.00 per hour. Regardless of that oversight, there was little correlation between a particular CNA's length of service with Respondent and whether Respondent was paying the CNA $14.00, $14.05 or $14.10 per hour. (See GC Exh. 2; Tr. 2263–2264; see also GC Exh. 96 (wage increases approved for Campbell, Hayes and Martin on May 30, effective back to May 20).)

[32] The three employees in line for this potential wage increase were not Campbell, Hayes and Martin. Instead, they were three other employees (Cheryl Cabral, Patricia Pacheco and Sharon Lukusa) who, despite their longevity with Respondent, were receiving nearly the same wages as new employees. (Tr. 515, 2069–2070, 2257–2258, 2277–2278; see also GC Exh. 2.)

[33] As one might expect, at trial the witnesses disagreed about some of the details concerning what occurred at the June 12 meeting. Some of the disagreements in testimony are not material to my analysis (such as the precise time in the meeting that Belezarian passed out the list of CNAs and their wage rates, see, e.g., Tr. 511, 630, 2068–2069, or whether the delegates stated in the meeting that they previously told Belezarian to negotiate with Teoli about the wage increases, see, e.g., Tr. 564–565, 2068).

Later on June 12, Belezarian texted Teoli to follow up on their contentious discussion about wage rates. The text exchange went as follows:

> Belezarian: [Please] give me the 2 weeks before u file board charges! I will make this right by then and if I have to go to Jonathan myself I will. I am afraid if u file the charges it will go in the other direction and not be good for anyone. I do apologize for catching you off guard and how I executed the whole thing. We have established a good relationship and I certainly don't want to destroy that. I did what I did with only the employees in mind and was only sneaky to my own boss. I didn't mean for u to perceive me that way.
>
> Teoli: Let me talk to [the] delegates and I will let you know.
>
> Belezarian: OK thank you. I can guarantee I will fix this shit fairly and will be sending u [a] proposal before end of week for the 3 employees who need to be raised up.

(GC Exh. 3; Tr. 2257–2258 (noting that the three employees Belezarian was referring to were Cabral, Lukusa and Pacheco); see also Tr. 515–516, 2070, 2188, 2266.)

M. Mid-June 2018 – Tensions Escalate after the Meeting about Wage Rates

1. Rumors circulate that the Union wants to lower CNA wage rates

After the June 12 meeting, the rumor mill at the facility accelerated, with employees asking each other about the wage rates they were earning. In one such discussion, Sullivan told Talbot that although Talbot was earning $14.00 per hour, that wage rate was incorrect and would need to be cut (down to the $11.50 per hour starting rate specified in the collective-bargaining agreement) because the higher rate was not approved by the Union. When Talbot subsequently asked Belezarian whether her wages would be cut, Belezarian assured Talbot that her wages would stay at $14.00 per hour, and advised Talbot to ignore what Sullivan and other union delegates were saying about wage rates.[34] More generally in this same timeframe, managers (at

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On the question of what, if anything, Teoli said about whether Respondent should rescind the wage increases that it gave to CNAs before June 12, I could not determine what occurred with sufficient reliability. (See, e.g., Tr. 629–632, 2067–2068, 2376, 2387.) It is clear, however, that after the June 12 meeting, the rumor mill (rightly or wrongly) indicated that the Union wanted to lower wage rates pending negotiations. I discuss that development and its effect on the bargaining unit in more detail below.

[34] Sullivan did not directly address this conversation with Talbot in her testimony, but she did deny telling "any of the per diem CNAs that if they became union CNAs [] their pay rate would go down." (Tr. 774.) Sullivan's limited testimony on this issue does not undermine any of my factual findings about her conversation with Talbot. Talbot was not a per diem CNA, and the question of whether Talbot's wage rate might be cut arose from Belezarian's decision to raise starting wage rates without first negotiating with the Union (not from any change from per diem to full-time status). Perhaps more important, both Minyo and Belezarian corroborated Talbot's testimony, as they testified that Talbot came to Belezarian to confirm that, contrary to what Sullivan said, Talbot's wages would not be cut.

Belezarian's direction) instructed various employees that they should not discuss their wage rates with their coworkers. (Tr. 311–312, 339–344, 363, 1889–1890, 1896, 1918, 2073–2074.)

After hearing about Sullivan's discussion with Talbot, Birch spoke to Sullivan and asked why the Union was upset about CNA starting wage rates being increased, and asked if Sullivan thought the wage increase should be reversed. Sullivan did not say yes or no regarding whether the wage increase should be rescinded, but asserted that Belezarian went behind the Union's back to implement the wage increase, and noted that it would have been different if the wage increase came out of negotiations. Sullivan added that with the $14.00 wage rate in place, it would be harder for the Union to negotiate a higher wage rate in the next collective-bargaining agreement.[35] (Tr. 1360–1363, 1473–1474, 1480, 1512; see also Tr. 1362, 1364 (noting that Birch also spoke with Rego, who gave a similar response about the wage rate increase).)

2. Birch decides to research how to remove the Union

After speaking with Sullivan and Rego about the CNA wage rate dispute, Birch decided to research how to get rid of a union. Birch found several websites that discussed the topic and printed out a set of instructions that described how to start a decertification petition. Next, Birch spoke informally with 10–15 nurses and CNAs to see if they were happy and wanted to remain in the Union. Based on the responses that she received (with many employees indicating that they were upset with the Union), Birch decided to prepare a decertification petition. Birch also contacted the NLRB to confirm that she had accurate information about the steps for decertifying a union, and to confirm that she would not get in trouble at work if she circulated the petition. (Tr. 1372–1382, 1458–1459, 1507, 1513–1514, 1910–1911, 2015; R. Exh. 25(a); see also Tr. 1458–1459 (noting that Birch's conversations with her coworkers about the Union happened both when Birch was at work and when she was not at work).)

3. Respondent and the Union fail to resolve the wage rate dispute

On the heels of the June 12 meeting, Teoli followed up with Belezarian to resolve the wage rate dispute. Initially, Belezarian responded positively by indicating that she was preparing an agreement for Veno to review. As the week progressed, however, Respondent (through Belezarian, Veno and Respondent's attorney Karl Fritton) took the position that it permissibly raised CNA wages under Article 5.1 of the contract, specifically by hiring new CNAs at the $14.00 per hour rate, and then increasing the wages of any existing CNAs to match the $14.00 per hour rate. In connection with its position on that point, Respondent declined the Union's request that the parties sign a memorandum of understanding (MOU) about wages because Respondent contended that its actions were consistent with the collective-bargaining agreement,

[35] To the extent that there were differences between Birch's trial testimony about this conversation and Birch's statements in her August 14, 2018 affidavit regarding whether Sullivan said Respondent should rescind the wage increase (see Tr. 1363, 1474–1477, 1511–1512), I have given more weight to the affidavit, since Birch provided the affidavit on a date closer in time to the actual events.

I do not credit Sullivan's testimony that she never spoke to Birch about the CNA wage rate increase. (See Tr. 772–773.) The evidentiary record shows that Sullivan was quite active in talking to coworkers (including Talbot) about their wages, and also shows that Sullivan told Talbot that her wages would be cut. Given those facts, as well as Birch's track record of questioning the union delegates about workplace issues, it is logical that Birch would speak to Sullivan about the wage rate issue.

and thus a MOU was not necessary. Due to their disagreement about signing a MOU, the Union and Respondent scrapped their plans for a June 26 followup meeting on wage rates. (Tr. 517–520, 522–527, 2071–2073, 2258–2260, 2268–2269, 2276–2277, 2381–2382, 2384–2385, 2469–2470; GC Exhs. 4–11, 53; see also Findings of Fact (FOF), Section II(C)(1) (discussing Article 5.1 of the collective-bargaining agreement).)

At some point during this same timeframe (mid-June), Belezarian spoke to Minyo about her (Belezarian's) frustrations with the Union. Belezarian reported that she had a hard time in the June 12 meeting, as Teoli was aggressive and upset, and the Union (in Belezarian's view) was more concerned with filling its own pockets than with keeping employees. Belezarian added that she hoped that Birch would hurry up and get the decertification petition to her because the facility would run more smoothly without a union.[36] (Tr. 314–316.)

4. Union continues its efforts to obtain information about wage rates

On June 18, the Union emailed Respondent's human resources office to request a list of all union employees. The Union amended that request on June 20, asking Respondent to send each union employee's "name, address, phone #, job title, floor/dept they are in, seniority dates, classification and hourly rate." (GC Exh. 54 (p. 3).)

On June 22, Respondent's human resources office provided a list of employees to the Union. The list, however, did not specify what each of those employees was earning per hour. Accordingly, Teoli contacted Respondent's attorney for assistance, but only received information on the starting wage rates for two employees who were hired on June 5. (GC Exhs. 13, 18, 54 (p. 3); Tr. 529–531.)

5. Union flyer about the wage rate dispute

With the wage rate dispute still unresolved, on or about June 22 the Union distributed a flyer to its delegates and members. The flyer stated as follows:

> **We All Deserve Living Wages and Good Benefits! Management wants to divide and conquer so [they] can keep our money!**

[36] To the extent that Belezarian denied knowing about Birch's plan to circulate a decertification petition, I do not credit that testimony. (See Tr. 2089, 2279, 2349 (Belezarian testimony that she didn't talk to Birch about the option of circulating a petition, and that no one told her when the petition was circulating). First, I note that Belezarian did not directly rebut Minyo's testimony about the conversation that I have referenced here. This is particularly significant since, as Respondent's designated trial assistant, Belezarian was present in the hearing room when Minyo testified. Second, Belezarian's testimony that she did not know about Birch's plan to circulate the petition is not consistent with the evidentiary record. Belezarian acknowledged that Birch came to Belezarian's office many times to talk, and that Birch complained about the Union in at least one of those conversations. Birch, meanwhile, acknowledged that before circulating the petition she spoke to 10–15 coworkers to get a sense of whether they wanted to stay in the Union. (Tr. 2279–2280; FOF, Section II(M)(2); see also Tr. 83–85, 1458, 1955 (noting that Belezarian communicated with workers regularly).) Given those communications, it stands to reason that Birch (or perhaps another coworker) gave Belezarian a heads up when Birch decided to proceed with circulating a decertification petition, which led to Belezarian's remarks to Minyo.

> Country Gardens' bosses will say or do anything to keep workers from having power. Suddenly they are claiming they wish they could give more money to workers. Well hurry up and lets make sure **everyone is benefitting** from the changes! **We have proposed a $15 starting rate for all employees, with additional raises for people who are already working here.** Management hasn't agreed.
>
> Instead they are making shady side deals, playing favorites, hiring people at different, secret rates, **refusing to negotiate higher rates for all employees, and hiding the facts!** We are the Union, and we have the right to all information needed to negotiate wages and bonuses for all! They are **violating the law by refusing to provide the union with all the information needed to ensure we all do better. What do they have to hide?**
>
> Management **hates** having to pay people fairly, and they **hate** that we have power in our union. They want to go back to the days where we can be fired without cause, where our wages, schedules, vacation time, benefits and everything we have can be taken away at any point for any reason or no reason at all. Our job security and benefits shouldn't depend on who we know, or whatever management is feeling that day. They should [be] in a signed contract that we agree on! They have never cared about us before and ***they are desperate to stop us now.*** **We won't be fooled! We know we're stronger together!**

(GC Exh. 48 (emphasis in original); Tr. 533–534, 2085–2086; see also GC Exh. 15 (p. 1) (June 25 email from Belezarian referring to a "letter" that the Union was circulating about wages).)

N. Belezarian Talks to Employees About Options for Leaving the Union

As chatter and tension continued to increase in the facility due to ongoing concerns about wages, Belezarian (on or about June 21) called small groups of CNAs into her office, where O'Kane was also present. Belezarian stated that she wanted to pay all CNAs the same base rate soon, but indicated that there were three options to accomplish that goal: wait and negotiate with the Union; sign a petition and vote the Union out; or have a majority of the CNAs resign but continue to work at the facility as employees of an outside staffing agency that would provide the same pay rates and benefits. The CNAs opted to resign and work for an outside agency, and accordingly, with Belezarian's guidance, hand wrote and signed resignation letters before leaving the office.[37] (Tr. 85–90, 94, 96, 107–112, 129–132, 135–138, 152–155, 180–183, 196,

[37] The CNAs that attended these meetings and signed resignation letters included: Tiffani Cabral; Nickole Gaeta; Stacy Hayes; Tanisha Miller; Victoria Palmer; and Nicole Talbot. (Tr. 86, 88, 129–130, 137–138, 180–182, 2074, 2276.)

I do not credit O'Kane's testimony that the meetings happened on or about June 28 (after the decertification petition circulated). (See Tr. 1640–1642.) Multiple witnesses, including Belezarian, testified that the CNAs signed resignation letters in Belezarian's office after tensions rose in the facility following the June 12 labor-management meeting concerning CNA wages, and before Birch circulated the decertification petition. (Tr. 94, 188–189, 2074–2075.)

I also do not credit Belezarian's testimony that the CNAs raised the issue of discussing options for securing their wages from a decrease (and potentially obtaining an increase). (See Tr. 2074–2076.) While CNAs were certainly concerned about those issues, I find that Belezarian was the one who started

201, 204–206, 1641–1644, 2074–2079, 2276, 2279; see also Tr. 188–189 (explaining that only a day or two separated this meeting from June 22, the day that Birch began circulating the decertification petition).)

The next day, Belezarian decided that the plan to have CNAs resign and work for an outside agency was a bad idea, in part because she was not certain that an outside agency could hire the CNAs as discussed in the June 21 meeting. Accordingly, Belezarian and/or the CNAs destroyed the resignation letters, and all CNAs that signed the letters continued to work for Respondent without any changes in their employment status. (Tr. 89–90, 137–138, 183–185, 206, 210, 1644, 2079–2080, 2280–2281.)

O. June 22–26, 2018 – Birch Circulates Decertification Petition

1. June 22 – Birch begins to collect signatures

On June 22, Birch was ready to circulate the decertification petition. Each page of the petition had lines for employees to sign and print their names, and had a header that generally stated as follows:

> The undersigned employees of [Respondent] do not want to be represented by the NE Healthcare Employees Union SEIU AFL-CIO.

(Jt. Exh. 29.) Birch selected June 22 (a Friday) as the date to begin circulating the petition because: (a) she was scheduled to work back-to-back shifts on June 22, 23 and 24 (starting at around 6:35 a.m. and finishing at around 11 p.m. each day), and thus would be able to speak to all employees working on those days; (b) she knew that no union delegates would be working at the facility June 22–24; and (c) management would not be at the facility on the weekend (June 23-24).[38] (GC Exh. 92; Tr. 705, 885, 959–960, 1382–1384, 1483–1484.)

Before coming to work on June 22, Birch texted a few coworkers to advise that she was bringing the petition to work, and to ask them to spread the word to other employees who would want to sign the petition. (Tr. 1384–1386.) Once Birch was at work with the petition, some

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the discussion about options for CNAs to avoid wage decreases and possibly get better wages. Belezarian was the one who called the meeting, and her remarks in the meeting were fully consistent with her previous statements indicating that she, and not the Union, was the one who wanted to find a way to increase CNA wages. Furthermore, Belezarian provided information on working for an outside agency, and had employees write and sign resignation letters (which she collected) before the meeting ended. All of those steps are inconsistent with the passive role that Belezarian outlined in her testimony about the meeting. (See Tr. 85–88, 130, 153–154, 180–181, 204–205, 1642–1644, 2076, 2079, 2276.)

[38] I do not credit Birch's testimony that she did not want management to know she was circulating the petition because she wasn't sure whether management wanted the Union in the facility. (See Tr. 1383–1384.) As a preliminary matter, Birch began circulating the petition on a Friday, when managers were present. The presence of management that day did not deter Birch from circulating the petition. (Tr. 1483–1484, 1519.) More broadly, the evidentiary record shows that in the weeks before she circulated the petition, Birch had no hesitation about going to Belezarian to voice her frustration about the Union. Given that fact, Birch's contention that that she was concerned about how management might react to her circulating the petition does not ring true.

coworkers (including Nicole Talbot and Kerry Nault) approached Birch and signed the petition before they began their shift. Birch also had two coworkers (Celina Caseiro and Gina Picard) come to her home to sign the petition. (Tr. 1387–1388, 1391–1393, 1459–1460, 1517–1518, 1798–1799, 1843–1845, 1892–1893, 1899–1900, 1917, 2016–2017.)

Several other employees, however, signed the petition while they were working at the facility. On June 22, for example, Birch asked the following employees to sign the decertification petition while they were on duty: Victoria Palmer, who was on duty in the East wing; Stacy Hayes, who was on duty at a cookout for facility residents; Kelly Sherman, who was on duty and had come to the East wing to stock supplies; and Nickole Gaeta, who was on duty and doing paperwork in the East wing. To encourage Gaeta to sign, Birch asserted that the petition provided an opportunity to get rid of the Union so Belezarian could raise CNA wages.[39] Birch generally kept the petition hidden (e.g., on her medication cart or at the nurses' station) but brought it out when approaching a coworker that Birch believed would be willing to sign the petition. (Tr. 91–95, 139–141, 185–190, 220–221, 223–224, 253–256, 286–288, 298–299, 1540–1543; see also Tr. 254–255, 287–288 (noting that Belezarian walked by and looked at Sherman while Sherman was signing the petition at the East wing nurses' station), 1486 (Birch admission that she left the East wing to bring the petition to the West wing, where a resident cookout was in progress).)[40]

Birch did get some help from coworkers in circulating the petition in the West wing of the facility. Specifically, Birch admitted that while she was on duty, she left the East wing to bring the petition to an employee assigned to the West wing. The employee obtained signatures on the petition from other individuals assigned to the West wing, and then one of the West wing employees returned the petition to Birch. (Tr. 1389–1391, 1483, 1485–1486, 1489–1490, 1517.)

2. Sherman expresses concern to Birch about the rules for circulating a petition

After signing the petition on June 22, Sherman walked back to the administrative offices, and mentioned to Minyo, Belezarian and Perry (who were together in the hallway) that she (Sherman) signed the decertification petition. Minyo responded "Shh. We're not supposed to talk about that." (Tr. 257–258, 288–289.)[41]

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[39] Birch denied telling anyone, while obtaining their signature on the petition, that the Union wanted to lower their wages. (See Tr. 1478.) That general denial, however, does not rebut Gaeta's testimony about what Birch said when Gaeta signed the petition – specifically that the petition, if successful, would get rid of the Union and enable Belezarian to raise CNA wages.

[40] I do not credit Birch's testimony that she only obtained signatures when she was on break, and that she never obtained signatures from coworkers (including Palmer, Sherman, Gaeta and Lukusa (who signed on June 26)) while they were on duty. (See Tr. 1386, 1460, 1485–1486.) Five employees testified that Birch asked them to sign the petition while they were on duty, including Hayes, who was one of Respondent's witnesses and testified that Birch obtained her signature while she (Hayes) was on duty at the West wing cookout. (FOF, Section II(O)(1).) Notably, when Sherman texted Birch about the need to be careful about following the rules for circulating the petition, Birch simply responded that she didn't know how else to gather signatures besides doing so while at work. (GC Exh. 45.) All of that evidence undercuts Birch's testimony about how she went about collecting signatures for the petition.

[41] Sherman testified that she also (separately) told Sousa that she signed the decertification petition, and that Sousa responded by "shushing" her. Sousa denies that this occurred. (Compare Tr. 257–258,

Later in the afternoon, Sherman became concerned that she had done something wrong by signing the petition. Accordingly, Sherman did some research online about union rules, particularly in the context of decertification petitions. Sherman then texted Birch, and the following exchange occurred between 6 and 7 p.m.:

> Sherman: April, I am trying to read up on it. Seriously you cannot even use the copy machine to copy the petition. Be careful. I am reading more on it so I understand the rules. I agree though [there] is a lot of negativity coming in one specific direction. We in health care have a 90 day window for a declaration
>
> Birch: I know I called a labor rep. I don't like collecting signs at work but [I don't know] how else
>
> Sherman: Of course just play it cool in case you have that 1 person. [You're] an awesome person and a hard worker, so are several others
>
> Birch: [Thank you] I'm trying to be careful

(GC Exh. 45; Tr. 258–262, 267–268, 290, 296–299, 1334–1336, 1431–1433.)

3. June 25 – Union delegates learn about the decertification petition

After a relatively quiet day on June 24 (in which only two additional employees signed the decertification petition), several union delegates returned to work on June 25 and heard rumors that: the decertification petition was circulating on work time; Birch and Belezarian were telling workers that the Union was trying to lower their wages; and Belezarian was calling employees into her office to sign "individual contracts." Nunes and Brown met with Belezarian to ask if any of these rumors were true. Belezarian denied knowing about these issues and said that it would be illegal to engage in the conduct that Nunes and Brown described. (Tr. 437–440, 483, 705, 885–888, 922–923, 1218, 1810–1812, 2087–2088, 2281–2282; Jt. Exh. 9.)

In addition, delegate Karen Hirst, who was not at work, sent out the following Facebook Messenger text (individually) to several coworkers:

> Just letting you know that even though I have not been there, I am aware of what is going on with the start rate increase and the pay rates that were given by Jamie that were kept hush hush. This was done by her without Union negotiation and behind corporate's back. When Linda found out about it, she was pissed and called corporate attorney. This all came to light at the last meeting that we had. A union building is supposed to be paid fairly to all members, that is why we negotiate. Jamie is well aware of that but decided to do whatever she wants, then got caught. I'll be back tomorrow if you have any questions.

288–289 with Tr. 1607–1608.) I need not resolve this conflict in testimony because Sherman also testified that she told Belezarian, Perry and Minyo about signing the petition, and her testimony on that point was not rebutted.

(GC Exhs. KH1, KH3 (p. 2).) Shortly after sending the text, Hirst received a telephone call from Teoli, who had just received a call from Belezarian about Hirst's message. Teoli told Hirst that she should not send any union discussions via text message. Hirst checked the schedule to see who might have told Belezarian about the text, and (correctly) concluded that it was Stacy Hayes since Hayes was at the facility at the time. Hirst texted Hayes a rat emoji, prompting Hayes to contact the human resources director to file a complaint against Hirst for harassment. (GC Exh. KH3 (p. 2); Tr. 959–967, 1544–1546, 1560–1561.)

4. June 26 – final day of circulating the decertification petition

On June 26, Lukusa was on duty and finishing up working with a resident when Birch approached and asked to speak with her when she (Lukusa) was done with the resident. Lukusa agreed, and signed the decertification petition after Birch asserted that the Union was trying to lower wage rates.[42] (Tr. 37–38, 45, 47–48, 51; see also FOF, Section II(O)(1) (explaining that I do not credit Birch's testimony that she did not obtain Lukusa's signature on the petition while Lukusa was on duty).)

By the end of the day on June 26, Birch had finished circulating the decertification petition. Three out of six employees in the RN unit signed the petition, while 29 out of 46 employees in the service and maintenance employees' unit signed the petition. (Jt. Exhs. 9, 29; see also Jt. Exh. 9 (indicating that 2 of the 46 employees in the service and maintenance employees' unit were hired on June 27, 2018).)

P. June 25 – July 2, 2018 – Responses to the Decertification Petition

1. Union renews its June 20 information request for bargaining unit member wage rates

On June 25, the Union sent an email reiterating its June 20 request that Respondent provide the hourly wage rates for all bargaining unit members. Belezarian responded that she was not authorized to provide that information, and asserted that Teoli already had the wage rates for CNAs. When Teoli emailed Belezarian later on June 25 to follow up on the issue, Belezarian advised that she was waiting on "corporate" to provide the information. (GC Exhs. 14–15, 54 (pp. 1–2); R. Exh. 10; Tr. 531–532; see also GC Exh. 18 (June 25 email from Teoli to Respondent's attorney, noting that the Union had requested the hourly rates for all union members).)

On June 26, Teoli responded to Belezarian's June 25 email by texting Respondent's attorney for assistance, stating:

[42] Lukusa also testified that she signed the decertification petition in part because Minyo had Lukusa speak with Belezarian on the telephone and Belezarian stated that Lukusa would receive a raise if the Union was out of the building. (See Tr. 39–40, 49–54.) I have not given any weight to that portion of Lukusa's testimony because: (a) Belezarian gave a different description of a conversation with Lukusa (stating that Lukusa was worried about her wages being cut, and Belezarian assured her that this would not happen, see Tr. 2178–2179); and (b) although the General Counsel called Minyo as one of its witnesses, the General Counsel did not ask Minyo to corroborate Lukusa's testimony about what (if anything) Belezarian said to Lukusa on June 26.

> I requested the hourly rates for all union members so I can review. And I am getting pushback from [the] facility. We have a right to this info as you know. Jamie [is] saying she has to ask corporate which is ridiculous. The facility has everyone[s] hourly rate. Make[s] me think they [are] hiding something. Please see I get this by Friday.

(GC Exh. 16.) Teoli emailed Respondent's attorney again on June 28 and 29 to ask where things stood with the Union's request for the hourly wages of all union members. (GC Exh. 19 (p. 1).)

2. June 26 – Teoli meets with bargaining unit members at the facility

On June 26, Teoli visited Respondent's facility to speak with bargaining unit members, where tensions continued to run high in light of the decertification petition and the ongoing frustration and confusion about wage rates. Once at the facility, Teoli waited in a grassy area behind the main building and spoke to employees who chose to come outside while on break. Generally, Teoli spoke to 1–2 employees at a time and fielded questions about hourly wages and why some employees received raises while others did not. Teoli also advised employees that the Union was trying to negotiate higher wages for everyone. (Tr. 533–537; see also GC Exhs. 10 (indicating that on June 21, Teoli told Respondent about her plans for a June 26 meeting), 15 (stating that union delegates were encouraging employees to talk to Teoli about raises).)

During these discussions, some employees indicated that they wanted to remove their names from the decertification petition because they signed the petition while under the impression that the Union was trying to lower wage rates. Based on those concerns, Teoli and some of the bargaining unit members planned to start their own petition to express support for the Union. (Tr. 537–538.)

3. June 28 – Teoli visits the facility again to meet with bargaining unit members

On June 27, Teoli emailed Belezarian to advise that she planned to return to the facility on June 28 to meet with any bargaining unit members that she missed on June 26. Initially, Respondent had reservations about Teoli's proposed meeting, asserting that it had received complaints that union delegates were harassing employees about leaving their job duties to meet with Teoli and warning that employees' wage rates would be reduced if they did not attend the meeting. Citing its concerns, Respondent stated that Teoli could conduct the proposed meeting under the following conditions: no employees would be permitted to leave their assigned job duties unless on an approved break; no general group meeting; meetings with individual employees must be brief; and any disruption of Respondent's operations or threatening behavior would result in discipline of the offending employees and revocation of permission to use the facility space designated for the meeting. The Union denied any wrongdoing and objected to the proposed restrictions. (GC Exhs. 17, 57; R. Exhs. 11–12; Tr. 540, 655–656, 2449–2450; see also Tr. 541 (noting that before June 27, 2018, Respondent did not place limitations on Teoli's meetings with bargaining unit members, such that Teoli could be on the facility floors on either wing to meet with employees); Jt. Exhs. 1–2, Article 3.2 (collective-bargaining agreement provisions stating that the Union shall have reasonable access to the facility to confer "briefly on non-working time with a Union Delegate or Employee(s)," subject to Respondent's reasonable

control and without conducting a general group meeting or interfering with the orderly operation of the facility).)

Ultimately, Respondent agreed to permit Teoli to meet with employees on June 28 in the employee break room. At the meeting, Teoli answered any questions that employees had about the decertification petition, and asked the delegates to obtain statements from employees about how they were asked (e.g., by management or by a coworker) to sign the decertification petition. (GC Exh. 17; R. Exh. 12; Tr. 967.) Teoli also brought in a petition in support of the Union, which stated as follows:

> **SEIU** Healthcare 1199NE
> United for Quality Care
>
> **United for Respect, Dignity & Living Wages**
>
> We, the undersigned 1199 members of Country Gardens, are united for living wages that keep pace with the cost of living, and good benefits that allow us to care for our families. What we earn shouldn't be based on who we know, and we demand management comply with the law and provide us basic information about current wages. Management would love to get rid of our union so they don't have to negotiate with us and they can continue to make shady side deals! It's time for [them to] negotiate our wages with us! **We know we're better off together!**

(GC Exh. 42.) Teoli obtained a few signatures on the union support petition while at the facility on June 28, and also gave copies of the petition to the union delegates to circulate. (Tr. 538–539, 541–542.)

4. June 29 – Respondent's memo to employees about the wage dispute

On June 29, Respondent issued a memorandum to its employees to address its ongoing disagreement with the Union. The memorandum stated as follows:

> Dear Valued Employee,
>
> Nearly two years ago, we purchased Country Gardens from its prior owner. When we met you, you were very unhappy. Your major concerns were lack of leadership, not enough staff leading to the usage of too many agency nurses, who you felt did not care, mandating of overtime and [building improvements]. . . .
>
> We made a promise that we would bring good solid leadership to Country Gardens and we have. We made a promise we would minimize and eliminate the usage of agency nurses and hire our own staff and we have. We promised that we would do our very best to eliminate [mandating] overtime and we have. Over the past year, staff, residents and families have acknowledged and thanked us for our commitment to Country Gardens.
>
> Most recently, we hired [CNAs] above our required hiring wage, and subsequent to that we also increased the rates of existing employees who were below that wage. We

notified the Union of this change, and we were shocked and dismayed with their angry reaction and their demand that we reverse the new employees and the employees who we increased wages back down to the lower rate of pay, because the Union could not take credit for this increase. WE EMPHATICALLY REFUSED to do so as it would be the wrong thing to do. Now the Union, in an effort to take credit, has reversed their position from lowering these wages, and has now taken on a campaign of unwarranted attacks and spreading blatant false information. This increase was not about taking credit. It was about doing the right and responsible thing for the good of all at Country Gardens.

We are and will continue to be committed to all residents and employees (union or non-union) as we have always done at Country Gardens. We refuse to take part in these bullying tactics and we shall **never** lower ourselves to a smear campaign. We will continue to treat everyone with respect and dignity and we hope to be treated the same. We implore you not to allow the recent activities of a handful of employees to distract you from providing the best possible care for our residents.

All of us have worked so hard to build a harmonious and family atmosphere at Country Gardens. Thank you for all you do for our residents. Together, we shall continue to make Country Gardens the provider and employer of choice. Further, we thank [Belezarian] for her outstanding servant leadership to Country Gardens.

Joe Veno, Regional VP of Operations
Lisa Sofia, CEO

(Jt. Exh. 3 (emphasis in original); see also Tr. 442–443, 2086–2087, 2325, 2359, 2386–2388.)

5. June 30 – the Union confronts Belezarian about suggesting that employees resign and work for a staffing agency

On June 30, Teoli emailed Belezarian to note that she (Teoli) had heard that Belezarian had been calling employees to her office and asking them to sign something so they could work for an agency. In response to Teoli's question about what this was about, Belezarian dismissed the assertion as "simply not true." (GC Exh. 20; Tr. 543.)

6. July 2 – Teoli meets with employees at the facility while managers observe nearby

Also on June 30, Teoli emailed Belezarian to advise that she was planning to come to the facility in the morning on July 2, primarily to speak with employees after they finished the overnight shift. Teoli noted that she planned to sit outside and be available to talk to any employees who wished to do so. (GC Exh. 21; Tr. 544.)

On July 1, Respondent, through its new attorney Aaron Schlesinger, emailed Teoli. First, Respondent asserted that bargaining unit employees improperly were posting union notices at the facility during work time and removing Respondent's notices. Respondent asserted that this conduct violated Section 3.1 of the collective-bargaining agreement and warned that similar conduct would not be tolerated and would result in appropriate discipline. Second, Respondent stated that it would not permit Teoli to meet with employees in the parking lot for a general

group meeting because: (a) the collective-bargaining agreement did not require Respondent to provide space to the Union for such a meeting; and (b) Respondent had received complaints that union representatives had been attempting to coerce and intimidate employees into attending union meetings against the employees' wishes. (GC Exh. 23; see also Tr. 549–550 (noting that Teoli did not read this email until July 2).)

At around 6:15 a.m. on July 2, Teoli arrived at Respondent's facility. As Teoli drove to the rear of the building to park her car near a parking lot and garage commonly used by employees (but also open to visitors and personnel making deliveries), Belezarian flagged her down. The following conversation ensued:

Belezarian: What are you doing? You can't be here.

Teoli: What are you talking about? I sent you an email telling you I was going to be here.

Belezarian: I'm going to have to call the cops on you.

Teoli: Why do you want to call the cops on me?

Belezarian: Well, didn't you get an email from the lawyer?

Teoli: No, I didn't get an email from Karl.

Belezarian: No, the other lawyer.

. . .

Belezarian: Well, you know, you can't be on the property and I'm going to have to call the cops.

Teoli: Well, I'm talking to members about what's going on in the facility, which is important issues. I'm going to meet with them briefly, the 11:00 [p.m.] to 7:00 [a.m.] shift.

(Tr. 546.)

Union delegates inside the facility advised their coworkers that Teoli was outside and available to talk about what was going on at the facility. Belezarian and Minyo remained in back of the building and observed (from a distance that ranged from 10–50 feet) while Teoli and another union representative chatted with individual employees that had questions about the decertification petition and other matters related to the facility. Belezarian and Minyo also escorted some employees to their cars after those employees indicated that they did not want to speak with the Union. Teoli remained at the facility for approximately 40 minutes, with Minyo and Belezarian present nearby for the entire time. It was unusual for Minyo and Belezarian to be at the facility at that early hour (both tended to arrive at 8 or 8:30 a.m.), and it was also unusual for them to be outside the facility at the location where Teoli was meeting with employees. (Tr.

352–353, 389–392, 416–419, 445–447, 545–549, 621–626, 785–786, 2019, 2179–2180, 2188–2191; GC Exh. 22 (photograph of Teoli and an employee in the rear of the facility, with Belezarian and Minyo in the background).)

Later in the morning on July 2, Schlesinger emailed Teoli. Schlesinger objected to Teoli ignoring his July 1 email about Teoli's meeting plans, and also objected to Teoli returning to the facility in the afternoon on July 2 to meet with additional employees. In support of Respondent's position, Schlesinger reiterated that Respondent did not have to provide the Union with space for a general group meeting, and stated that Respondent had received complaints from employees about attempts to coerce or intimidate them into meeting with the Union. (GC Exh. 24; Tr. 551.) There is no evidence that Teoli returned to the facility later on July 2 for an additional meeting.

Q. Late June/Early July 2018 – Birch Files the Decertification Petition

On or about June 26, Birch contacted the NLRB to ask what she should do with the decertification petition that she circulated. Based on her conversation with an NLRB agent, Birch filled out the NLRB cover form for petitioning to decertify a collective-bargaining representative and sent it (and the petition signature pages) to the NLRB via overnight mail on June 26. (Tr. 1394–1399, 1493–1496, 1503; R. Exh. 26.)

On or about June 27, Birch gave Belezarian a copy of the decertification petition paperwork, but without the signature pages. Birch also mentioned that it might be possible to withdraw recognition from the Union if 50 percent of the bargaining unit signed the petition. Belezarian told Birch that she would get back to her, and notified Veno and Lisa Sofia (Respondent's CEO) about the petition. A bit later, Belezarian told Birch she would need the signature pages to verify that the signatures on the petition were valid, which prompted Birch to contact the NLRB to see if the petition had arrived (Birch did not have a copy of all signature pages). The petition paperwork had not arrived, however, because Birch sent the materials to the wrong address. (Tr. 1496–1497, 2094–2097, 2282–2283, 2349; see also Tr. 2394–2395, 2471–2472 (noting that on or about June 29,[43] Veno, Belezarian and other officials of Respondent discussed the petition in a conference call).)

Over the next few days in late June, Belezarian and Minyo (at Belezarian's request) continued to ask Birch if she had the petition signatures. Birch, meanwhile, attempted to have the mis-addressed petition paperwork forwarded to the NLRB, and stayed in touch with the NLRB to see if the petition paperwork had arrived.[44] (Tr. 316, 346, 1496–1498, 2096–2097.)

On July 2, the NLRB received Birch's decertification petition and sent Birch a copy of the petition and signature pages. On the same day, Birch hand delivered a copy of the petition signatures to Belezarian, who scanned and forwarded them for Respondent's review. Although

[43] Veno testified that the June 29 call was the first time he heard about the decertification petition. (Tr. 2394–2395, 2471–2472.) The accuracy of that testimony (particularly as to the date of the call) is not material to my analysis.

[44] Birch denied that Minyo and Belezarian asked her for the petition signatures. (Tr. 1503.) I do not credit Birch's testimony on that point. Both Belezarian and Minyo testified that they asked Birch for the petition signatures, and Birch admitted to contacting the NLRB in that same timeframe to obtain the signature pages.

the NLRB received the petition on July 2, the petition was not officially filed until July 5 because: (a) the petition was premature by a few days; and (b) Birch omitted a signed and dated certificate showing that she served copies of the petition on Respondent and the Union. After those issues were addressed, the NLRB (on July 5) issued a Notice of Petition for Election and a Notice of Representation Hearing (scheduled for July 13). (R. Exhs. 26–27, 29; Tr. 1400–1406, 1414–1415, 1496–1500, 2097–2098, 2283–2284.)

After receiving the paperwork from the NLRB, Birch called the NLRB on or about July 5 to express concern about having a hearing and ask what would happen if the Union did not agree to a hearing. Birch also asked about the possibility of Respondent withdrawing recognition from the Union based on the percentage of employees who signed the decertification petition. The NLRB agent explained the steps that would be involved if the parties proceeded to an election, and also explained some of the questions that would have to be answered (e.g., the number of employees in the Union) to determine if Birch had enough signatures for Respondent to withdraw recognition from the Union. Birch subsequently spoke with Belezarian about what she (Birch) learned from her telephone call with the NLRB agent.[45] (Tr. 1414–1418, 1433–1435.)

R. July 4, 2018 – Union Circulates a Flyer about the Benefits of Being in a Union

On or about July 4, the Union circulated another flyer to its bargaining unit members. The flyer, which was posted in various locations at the facility, stated as follows:

Things you take for granted that your Union does for you!

You have the right to organize without retaliation.
Your employer cannot discriminate against you.
You have union representation if you need it.
The union negotiates your benefits which would be cut without the union such as:

Wage equality, fair wages for everyone and no favoritism.
Shift and weekend differentials.
Guaranteed raises twice a year.
Seniority, continuous length of employment applies to layoffs and ability to apply for a posted position.
Overtime 1½ hours pay after 40 hours worked.
Holiday pay currently 7 paid, kiss that [goodbye] without a union.
Vacation time according to years of seniority.
Vacation time granted according to seniority. Other facilities have to find [their] own replacement.
Protected sick leave.
Death in the family pay.
Pay if you are called to jury duty.

[45] Ultimately, the NLRB dismissed Birch's petition. Specifically, shortly after July 6, an NLRB agent advised Birch that the petition was defective because the petition covered two bargaining units instead of one. Birch opted against amending her petition or refiling two separate petitions because Respondent already had withdrawn recognition from the Union. (Tr. 1500–1501.)

> Leave of absence without worrying if you have a job to return to.
> Affordable medical insurance, expect your contribution to triple without a union.
> Ensure that insurance is basically the same if they change carriers.
> You have the right to a grievance and arbitration procedure[] to fight unfair termination.
> [In other] words, the union will fight for you to keep your job.
> The employer must provide a safe and healthy environment for you to work in.
> Modified duty in the event of a work related injury not allowing you to work full duty.
> Protection in the event of a work related injury.
>
> This is all part of negotiating a fair contract [for] ALL members. If you think this is an easy task, you are MISTAKEN. If you have been led to believe that you would be better off without a UNION, then you are seriously MISTAKEN. Do not believe what has recently been told to you. Feel free to ask any questions to: Stephanie Sullivan, Phyllis Gomes, Dawn Nunes, Viola Rego, Donna Brown or Karen Hirst YOUR UNION DELEGATES. UNITED WE STAND!

(R. Exh. 28 (p. 2); see also Tr. 1407–1409, 1855.)

Later on July 4, Belezarian texted Gomes about the union flyer. Belezarian stated as follows:

> Hi Phyllis I saw the flyer u guys have with what the union does for u. I suppor[t] that flyer and pls feel free if u didn't already to place on your union board. [No] one can distribute any literature or post on any public boards. [That] is just the policy but I like the flyer of what the union has done for you. Happy 4th!

(GC Exh. 100; see also Tr. 2328–2329.)

S. July 6, 2018 – Union Representatives Meet with Employees in Front of the Facility

On July 6, Teoli returned to the facility to meet with bargaining unit members at a table that she set up in the grass in front of the facility. Shortly after Teoli arrived, Belezarian confronted her and asserted that she was going to call the police because Teoli was not permitted to be at the facility. Teoli disagreed, asserting that there was a lot of uncertainty at the facility and that she needed to speak to bargaining unit members. Belezarian then called the police and remained standing with other managers a few feet away from Teoli's table (less than 50 feet, based on the photographs in the evidentiary record) while Teoli met with bargaining unit members. When the police officer arrived, Belezarian asserted that Teoli was trespassing, and Teoli responded that the Union had a binding contract with Respondent and had a right to be at the facility to speak to bargaining unit members. Ultimately, the police officer advised Teoli and

Belezarian that Teoli could be present at her location in front of the facility.[46] (Tr. 551–559, 1699–1702, 1724, 2104, 2191–2194; GC Exhs. 25–27.)

T. July 6, 2018 – Respondent Withdraws Recognition from the Union

On or about July 6, Respondent reviewed the signatures on the decertification petition and determined that 50 percent or more of each bargaining unit signed the petition (3 out of 6 members of the RN unit, and 29 out of 46 members of the service and maintenance employees' unit). Relying on the petition, Respondent concluded that the Union lacked majority support in both bargaining units and withdrew recognition of the Union as the collective-bargaining representative of the units. Through counsel, Respondent sent the following email to the Union:

> Dear Ms. Teoli . . .
>
> As you are aware, this firm is counsel to Country Gardens Nursing and Rehabilitation Center ("Country Gardens"). Please be advised that Country Gardens has been provided with a Disaffection Petition requesting that it immediately withdraw recognition from District 1199 New England Healthcare Employees Union SEIU, AFL-CIO ("Union"), executed by representatives of both bargaining units (RNs)(Licensed Practical Nurses, Nurses Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees, Laundry Employees and Office Employees). The signatures, which have been checked with employee records, show that the Union no longer possesses majority support of the two bargaining units at issue both individually and combined. In light of the foregoing, please take this email as formal notice that pursuant to the Petition, effective immediately, Country Gardens hereby withdraws recognition of the Union as the collective bargaining representative of the employees of both units.
>
> Please be advised that in light of the foregoing, your request for a meeting next week is denied. Moreover, all further communications between you or any other representative of the Union involving the facility are to be conducted through me as counsel.

(Jt. Exh. 5; see also Jt. Exhs. 4, 6, 9, 29; GC Exhs. 27, 58 (July 2 email from Teoli indicating that she planned to meet with employees on July 11); Tr. 2399 (indicating that Veno also advised Union representatives by phone that Respondent was withdrawing recognition from the Union).)

Respondent also issued a memorandum to all employees to notify them of its decision to withdraw recognition of the Union. The memorandum, which Respondent posted at various locations in the facility, stated as follows:

[46] To the extent that Belezarian and Perry testified that this event occurred after Respondent withdrew recognition from the Union (such as on July 9 or 11), I do not credit that testimony. Perry accepted that timeframe in response to closed questions from Respondent's counsel, and for similar reasons Belezarian testified that both July 9 and 11 were the correct date. (See Tr. 1699, 2104, 2191.) While I do not suggest that counsel's closed questions were improper, I do afford less weight to the witnesses' answers because their memories are less clear on the point, in contrast to Teoli, who testified to the July 6 date in response to an open question. (See Tr. 551.)

Dear Valued Employees:

We were recently provided with a Disaffection Petition by you requesting that we immediately withdraw recognition from [the Union] which was executed by a vast majority of representatives from both bargaining units. The signatures, which have been checked with employee records, show that the Union no longer possesses majority support of the two bargaining units at issue both individually and combined. In light of the foregoing, and in honoring your wishes, we served the Union today with formal notice that pursuant to the Petition, effective immediately, [Respondent] has withdrawn recognition of the Union as your collective bargaining representative for both units.

We have recently learned that in an attempt to change your minds regarding the Petition, yesterday, the Union arranged to have notices distributed around the facility disparaging management absent proper factual support by stating that without it, your wages and benefits might be reduced or removed. **Nothing could be further from the truth and we must set the record straight!** At no time ever, will we implement any reduction of your wages and benefits which are currently provided. Moreover, the Union may utilize tactics to change your mind involving misinformation, intimidation and coercion. If you are subjected to such conduct, please feel free to advise us of same and we will assist you in implementing an appropriate response such as filing an Unfair Labor Practice Charge with the NLRB.

As always, we will continue to treat you with respect and honor your wishes and preserve the culture we have worked so hard to achieve so that your continued employment with [Respondent] is a beneficial experience for both you and our residents.

If you have any questions concerning this memorandum, please feel free to reach out to us.

(Jt. Exh. 7 (emphasis in original); Tr. 262, 317–318, 346–347, 1437, 1646, 1812, 1853–1854, 1902, 2098–2099, 2396–2398, 2472–2474, 2559–2560.)

U. Changes at the Facility immediately preceding and after Respondent's Withdrawal of Recognition of the Union

1. Increased monitoring of employees at the facility

As indicated above, by late June, Respondent was aware that Birch had circulated the decertification petition and that there might be enough signatures to withdraw recognition of the Union. Shortly after learning of those developments, and also in light of the overall tension between employees, Respondent took various steps to monitor the activities of employees at the facility and/or deter employees from congregating to talk about issues at the facility to the degree that they became distracted from their job duties. For example, beginning on about June 30 and even more so after July 6, Respondent's managers increased their presence at the facility by coming to work earlier and on weekends, and by spending more time in the patient care areas

(i.e., by being on the East or West wing instead of in the administrative offices).[47] (Tr. 460–461, 746–747, 780–781, 808, 893–894, 924, 975–978, 1645–1650, 2099–2102, 2136–2138, 2422–2423; see also Tr. 461, 894 (noting that the increased managerial presence on the unit floors stopped in late summer or early fall 2018).) In addition, on June 30, Belezarian ordered a set of fake cameras that were installed on the patient wings in early July and, based on how some of the cameras were positioned, gave the impression that Respondent was recording activities in the hallway and at the entrances to kitchenettes where employees often took their breaks.[48] (Tr. 99–101, 143–145, 323–324, 326–329, 350–351, 354–355, 365–366, 456–457, 490–491, 1646–1647, 1649, 2138–2141, 2285, 2327, 2420–2422, 2519–2520; GC Exhs. 38–40, 97.)

While any kind of employee unrest, distraction or discord was a cause for concern, Respondent's managers were particularly attuned to tamping down activities by union supporters. Measures to limit or prevent union activities included, but were not limited to:

After Respondent withdrew recognition from the Union, making sure that "there was no union talk or buzz or anything going on";

Telling (through Veno) a group of employees on July 9, 2018, that they could wear union buttons as long as doing so did not interfere with patient care, but could not engage in any other union business in the building;

Removing the Union's bulletin board; and

Making rounds at the facility and disposing of any union literature or materials, including any such materials on bulletin boards or in rooms where employees took their breaks.

(Tr. 318, 393–394, 402–403, 419–420, 808–813, 861, 888, 1437–1438; GC Exh. KM1 (pp. 1–2) (July 15 text message from Perry asking Minyo to keep an eye out for any "union crap" in break rooms or on bulletin boards); see also Tr. 403 (explaining that before July 6, the Union posted information on various bulletin boards at the facility, including a board located near the timeclock and boards in bathrooms).)

2. Changes in how Respondent interacted with the Union and the bargaining unit

After withdrawing recognition of the Union, Respondent immediately made several changes in how it interacted with the Union and bargaining unit members. First, Respondent stopped deducting union dues from employee paychecks and providing a copy of the collective-bargaining agreement to new hires. (Tr. 2323, 2521; Jt. Exh. 8 (July 12 memorandum advising employees that Respondent would no longer be deducting union dues from employee

[47] During this timeframe, managers spent some time going back and forth between the East and West wings. In one instance on June 30, Belezarian questioned Hirst about why she was on the East wing. When Hirst explained that she walked over from the West wing (her assigned unit) to deliver some work-related paperwork, Belezarian told Hirst to get back to her unit. (Tr. 443–445.)

[48] In or about late July or early August 2018, Respondent installed real cameras, albeit in slightly different locations that focused on hallways, exits and nurses' stations. (Tr. 492–493, 1297, 1299–1300, 2141–2142; see also GC Exh. 98 (email indicating that the real cameras were installed by August 16, 2018); Tr. 2287–2288.)

paychecks).) Second, although the collective-bargaining agreements were effective through October 31, 2018, and have grievance and arbitration procedures, Respondent stopped processing (or did not respond to) pending and new employee grievances and arbitrations, including two grievances filed on behalf of Sullivan in July 2018. (Tr. 399–402, 421–422, 426, 432–434, 563–564, 882–883; GC Exhs. 37, DB1, PG1; Jt. Exhs. 1–2 (Article 18); compare GC Exh. KH2 (May 2018 grievance form showing a written response from Respondent).) Third, when the Union presented Respondent with an information request on July 10 for the addresses of nine employees, Respondent refused to provide the information on the grounds that it was private in nature. (GC Exh. 28; Tr. 563.) Fourth, Respondent stopped notifying the Union about employee discipline and ended its practice of having a union representative present for disciplinary meetings (though the employee could still request that a delegate or coworker be present for such meetings). (Tr. 2322–2323.) And fifth, Respondent resumed filling open work shifts without regard to seniority. (Tr. 465–466, 496; GC Exh. 37.)

V. July 9 & 11, 2018 – Stephanie Sullivan's Suspension and Discharge

1. Background

Stephanie Sullivan began working as a CNA at the Country Gardens facility in 1983, and typically worked on the East wing. Beginning in or about 2003, Sullivan began serving as a union delegate. In that capacity, Sullivan (among other things): advocated for bargaining unit members about discipline and other workplace issues; filed grievances; attended labor-management meetings; and served on the contract negotiation committee. (Tr. 404–405, 468, 701–705, 843–844, 905–906, 939–940, 1223–1224, 2244, 2544–2545.)

In May and June 2018, Sullivan participated in meetings with management about CNA wages and other workplace issues. Sullivan also spoke to coworkers about the Union's efforts to negotiate with Respondent about wages and helped circulate the counter petition in support of the Union. (Tr. 747–748.)

Sullivan did engage in conduct that was problematic. For example, some of the staff maintained that Sullivan was difficult to work with because she would not assist them with work related tasks and did not follow the schedule for taking breaks or going to lunch. Further, Sullivan called CNA Victoria Palmer a "crackhead" as an ongoing nickname, and in or about early July pulled CNA Nicole Talbot into a linen closet to confront her about rumors that Talbot was disclosing Sullivan's salary.[49] And, as previously noted, some employees viewed Sullivan as being part of a union delegate clique that was not forthcoming about union meetings and activities and was not representing the bargaining unit effectively. Although management was

[49] I do not credit Sullivan's testimony about the linen closet incident with Talbot. Sullivan testified that she guided Talbot into the closet as a "motherly gesture" and for the purpose of talking to Talbot about Palmer's concerns about the "crackhead" nickname Sullivan used. (See Tr. 750–752, 771.) Sullivan tended to minimize the gruff manner she used when interacting with coworkers she disagreed with – even one of the General Counsel's witnesses described Sullivan as "a little rough." Further, I found Talbot to be credible when she explained that she and Sullivan talked about wages in the linen closet. Wages were the key issue in the May-July timeframe, and Talbot's description of the linen closet incident is fully consistent with that backdrop. (Tr. 239, 1902–1904; see also Tr. 673 (coworker Laurie Sylvia describing how Sullivan told her to put on a fucking union pin).)

aware of some of these issues, there is no evidence that management took disciplinary (or other) action against Sullivan to address any of them. (Tr. 198–200, 213–215, 357–360, 749–750, 752–753, 1352–1355, 1369, 1850–1851, 1872, 1902–1903, 1907, 2093–2094; see also Tr. 782 (noting that Belezarian and O'Kane also called Palmer a "crackhead").)

2. July 9 – Respondent suspends Sullivan

On July 9, activities assistant Laurie Sylvia was on the East wing at Respondent's facility when she encountered Sullivan at the nurses' station. Sullivan attempted to give Sylvia a union button, and when Sylvia hesitated, Sullivan yelled at her to "put the fucking thing on."[50] Sylvia agreed, but was upset about the exchange, in part because she did not see Sullivan or Donna Brown (who was present) wearing union buttons of their own. (Tr. 673–674, 676, 679, 724; see also Tr. 786–787 (noting that Sullivan did not leave a resident in order to give Sylvia the union button).)

Sylvia left the East wing and decided to remove the union button after describing the incident to food service director Joe Little and supervisor Rachel Hansen. A little later (after hearing from Little that Sylvia was upset about being given a union button) Belezarian and Minyo approached Sylvia in the dining room, and Sylvia described what happened with Sullivan. Belezarian explained that Respondent had just withdrawn recognition of the Union (Sylvia was on vacation when that occurred) and stated that no one was allowed to talk union business. Sylvia indicated that she did not want to be in trouble for taking the union button and declined Belezarian's request for a written statement about her interaction with Sullivan because she did not want to get involved. (Tr. 674–677, 679–680, 697, 814–815, 2102–2103, 2482; see also Tr. 2485 (noting that Little only saw Sylvia upset in the dining room).)

Later in the day, Belezarian and Veno called Sullivan to Belezarian's office for a meeting. At Sullivan's request, Brown also attended the meeting as a witness. At the meeting, Belezarian and Veno presented Sullivan with a disciplinary action report that stated as follows in connection with Sullivan's interaction with Sylvia:

> Work rule, policy, standard, etc. violated: Solicitation & Distribution. Leaving work area on unassigned break to solicit another employee while the other employee also was not on an assigned break in a resident area (Dining Room).

Sullivan denied leaving her work area on an unassigned break, and also asserted that she and Brown were working on the East wing at the time (10:30 a.m.) that Respondent stated Sullivan left her work area. Ultimately, Veno told Sullivan that he would complete the investigation as soon as he could, and that Sullivan should gather her belongings and leave the building. Veno added that if Sullivan was cleared after the investigation she would be brought back to work and receive backpay for any shifts that she missed. (Tr. 705–712, 888–890, 2103–2104, 2484–2487;

[50] Sullivan denied using profane language with Sylvia and asserted that she silently showed Sylvia the union button and that Sylvia took it without comment. (Tr. 724, 765.) I do not credit that testimony. As previously noted, Sullivan tended to minimize the gruff manner she used when in conflict with coworkers. I also note that Sylvia was one of the General Counsel's witnesses and had no motive to be untruthful about her July 9 interaction with Sullivan.

GC Exh. SS1 (disciplinary action report); see also Tr. 449, 1219–1223, 2403–2404, 2489–2490, 2565–2566 (noting that in a July 9 discussion with employees who objected to Sullivan's suspension, Veno advised that Sullivan would receive backpay if cleared after the investigation).)

3. July 9–11 – Respondent investigates the Sullivan-Sylvia incident

After the July 9 meeting, Respondent had two conflicting versions of the exchange between Sullivan and Sylvia. Specifically, Belezarian maintained that Sylvia stated that the incident occurred in the dining room, while Sullivan denied going to the dining room and maintained that she was working on the East wing at the time in question. To investigate and resolve that dispute, Respondent asked Sullivan to provide a written statement and Sullivan agreed to do so. Little and Sylvia each refused to provide written statements, and there is no evidence that Respondent approached them or any other employee for additional information or clarification (verbal or written). (Tr. 697, 2103–2106, 2246–2247, 2405, 2482–2483, 2549–2550; see also Tr. 2102, 2247, 2485–2486 (explaining that Respondent relied on its understanding of Sylvia's verbal statement because Little only reported seeing Sylvia upset in the dining room).)

Meanwhile, Brown filed a grievance on July 10 to contest Sullivan's suspension. In addition, Sullivan asked Sylvia by telephone (on or about July 9 or 10) to submit a statement that Sullivan did not give her a union button (Sylvia refused).[51] (Tr. 680–681, 694, 882; GC Exh. DB1; see also GC Exh. SS6 (pp. 1–2) (Sullivan's text message attempts to contact Sylvia on July 9–10).)

4. July 11 – Respondent discharges Sullivan

On July 10, Belezarian called Sullivan. First, Belezarian asked if Sullivan had a written statement to provide. Sullivan did have a statement, but was not able to drop it off and did not feel comfortable photographing it and sending it to Belezarian via text message. Accordingly, Belezarian agreed that Sullivan could bring the statement on July 11 when a 2:30 p.m. meeting with Veno, Sullivan and Belezarian would occur. Second, Belezarian advised Sullivan that Respondent planned to bring her back to work and pay Sullivan for the work time she missed while suspended. Belezarian added that Sullivan would be working the 3 to 11 p.m. shift after the meeting. (Tr. 713–714, 2245.)

On July 11, Belezarian and Sullivan spoke and exchanged texts about Sullivan needing to call a department of public health administrator who needed information for an unrelated investigation. Belezarian also asked Sullivan to arrive at 3:30 p.m. because Veno would not be available until that time. Sullivan agreed, and asked Belezarian to arrange for Brown to attend the meeting as well. (Tr. 714–717; GC Exh. SS3.)

[51] There is no evidence that Respondent was aware of Sullivan's phone call to Sylvia, or that Respondent relied on the phone call as a basis for deciding to terminate Sullivan. The same point applies to the text messages that Sullivan sent to Sylvia (mostly on or after July 12) about obtaining a statement concerning what happened with the union button (i.e., Respondent was not aware of the text messages when it terminated Sullivan). (See GC Exh. SS6; R. Exh. 15.)

At around 3:45 p.m., Veno, Belezarian, Brown and Sullivan convened for their meeting, with Sullivan appearing in scrubs because she believed she was going to work after the meeting. Initially, Sullivan presented a written statement denying that she left her work area on July 9 for any unassigned breaks, and listing the shifts that she missed during her suspension because she expected to receive backpay for that time.[52] Veno, however, advised Sullivan that she was being terminated for leaving her work area on July 9 because of two verbal statements from witnesses (Sylvia and Little, though Veno declined to identify them in the meeting). Belezarian memorialized the decision to terminate Sullivan by writing "CNA was terminated on 7/11/18" on the July 9 disciplinary action report and signing the form. Sullivan did not have a record of any prior discipline in the preceding 18 months. Gomes filed a grievance on July 11 to contest Sullivan's termination. (Tr. 701, 717–723, 777, 891–893, 1224–1228, 2105–2108, 2244–2246, 2344, 2404–2407, 2487–2492, 2545–2546, 2548, 2552, 2568; GC Exhs. PG1, SS1, SS4; see also Tr. 2495 (noting that Respondent made its decision to terminate Sullivan before the 3:45 p.m. meeting took place); 721–722, 892, 2406–2407, 2492 (noting that Veno stepped out of the meeting for a few minutes to consult with Respondent's counsel by telephone about proceeding with Sullivan's termination based on two verbal statements).)

5. Comparator evidence

In its June 2016 employee handbook, Respondent listed "Leaving the assigned work area without permission" as one of twenty-three examples of conduct "for which immediate discharge may result." (Jt. Exh. 10 (p. 23).) In practice, however, it was not uncommon for employees at the facility to leave their assigned work areas briefly without obtaining permission, provided, of course, that they were not abandoning a resident to do so. For example, employees might leave their work areas (without permission) to: socialize with staff, including managers, in the administrative offices; or have a snack or something to eat, such as donuts or other items that someone brought to the facility. There is no evidence that Respondent disciplined employees for leaving their work areas under those circumstances. (Tr. 102–104, 467–468, 497, 907–910; see also Tr. 1486 (noting that Birch left her work area to bring the decertification petition to the West wing).)

It was also common for Respondent's employees to briefly engage in nonwork activities while on duty in their assigned work areas, provided that they were not abandoning a resident that needed attention. For example, employees, including managers, might take a moment (often at the nurses' station) to: consider buying items that a coworker was selling as a fundraiser or as a sideline business; pick up items that they purchased from coworkers; or pick up treats (e.g., cookies, pens) that coworkers or contractors brought to the facility for employees. There is no

[52] Although Sullivan's statement bears a date of July 12, multiple witnesses (including Belezarian, see Tr. 2246) agreed that Sullivan presented the statement to Respondent during the July 11 meeting. I do not credit Veno's testimony to the contrary (see Tr. 2494–2495), because his testimony was prompted by seeing the July 12 date on Sullivan's statement during trial, and conflicts with the weight of the evidence (including testimony from Belezarian, who was one of Respondent's witnesses). In addition, I note that Sullivan was highly motivated to receive backpay for the shifts she missed while suspended. It therefore stands to reason that she would provide those missed shifts to Respondent on July 11 (as she did by writing the missed shifts underneath her written statement about the July 9 incident), the day that she thought she was returning to work.

evidence that Respondent disciplined any employees for engaging in these types of activities. (Tr. 102–104, 147–149, 155, 384–389, 413–414, 461–465, 497, 725–730, 778–779, 844–847, 898–901, 928–930, 1661–1662, 2329–2332, 2360–2361; GC Exh. 35; see also Tr. 2108–2110, 2423 (noting that Respondent does have a policy that prohibits employees from solicitation while on duty); Jt. Exh. 10 (p. 22) (employee handbook policy regarding solicitation and distribution, prohibiting employees from soliciting other employees while on working time).)

W. July 15–19, 2018 – Karen Hirst's and Katherine Minyo's Suspensions and Discharges

1. Background – Karen Hirst

Karen Hirst began working at the Country Gardens facility in or about 1981, and worked in the position of licensed practical nurse at the facility since in or about 1983. Hirst generally was assigned to work on the West wing of the facility. In or about 1993, Hirst began serving as a union delegate. In her capacity as a delegate, Hirst (among other activities) represented workers in grievances and participated in labor-management meetings and contract negotiations. Occasionally, Hirst took on grievances that other delegates were hesitant about supporting, including filing and pursuing a May 28, 2018 grievance concerning a coworker who was terminated because of a history of absenteeism, but (in Hirst's view) warranted Respondent's consideration because of extenuating circumstances. (Tr. 404, 468, 843, 904–905, 942–943, 945–952, 955–956, 1052, 1055–1061, 1130–1131, 1229–1230, 2538–2539; GC Exhs. 55, KH2; see also Tr. 2154, 2372–2375 (noting that Respondent and the Union settled the May 28, 2018 grievance with an agreement that Respondent would reinstate the employee under a last chance agreement); GC Exh. 99 (pp. 8–10) (same).)

Hirst remained active as a delegate in late June and early July 2018, including during the time of the decertification petition and Respondent's decision to withdraw recognition of the Union. For example, on June 25 after hearing about the decertification petition, Hirst texted various coworkers about her concerns regarding how Belezarian was handling CNA wages. When Teoli (at Belezarian's request) told Hirst to stop sending union discussions via text, Hirst texted a rat emoji to Stacy Hayes, who told Belezarian about Hirst's texts. Veno subsequently, on June 28, issued a verbal warning to Hirst for sending the rat emoji to Hayes. In addition, on June 28, Hirst brought union buttons, lanyards and tag holders to the nurses' station for employees to pick up if they wished, and on July 12 wore a union button and shirt to work to protest Sullivan's termination, and posted a photograph online of herself in union attire. (FOF, Section II(O)(3); GC Exhs. KH1, KH3, KH4; Tr. 960–961, 963–967, 970–974, 979–980, 1744–1745, 2388–2392, 2474–2478, 2565.)

2. Background – Katherine Minyo

In 2018 (up to her termination on July 19, 2018), Katherine Minyo worked for Respondent as the assistant director of nursing. Since Minyo was part of the management team, she received instructions from Belezarian on various issues, including keeping tabs on union activity in the facility after Respondent withdrew recognition of the Union. (Tr. 300, 808–810; GC Exh. 60(a)–(b).)

3. Respondent's policy regarding reporting resident abuse

In its June 2016 employee handbook, Respondent explicitly states that it strongly supports patients' rights and accordingly "will not tolerate the physical, verbal or emotional/psychological abuse of a resident, or neglect of resident-care duties related to the safety, health and/or physical comfort of the resident." (Jt. Exh. 10 (p. 26).) The handbook also states as follows regarding the duty of employees to report potential abuse:

> If you are a witness to a situation where you believe that a resident's physical, mental or general well-being has been or may be abused or neglected, you must report it immediately to your supervisor, department head or Administrator. Failure to report such an occurrence can result in termination.

(Jt. Exh. 10 (p. 26).) All employees, including Hirst and Minyo, received periodic training on the obligation to report potential resident abuse and the procedure for making reports (including providing immediate verbal notice to the employee's direct supervisor to allow for a prompt investigation and written statements to be obtained from employees on duty). (GC Exhs. KH5, KH6; R. Exhs. 16–21, 23; Tr. 405–408, 424–425, 791–792, 799–800, 817–819, 847–848, 868–874, 981–992, 1072–1073, 1532, 1634, 1665–1666, 1772–1773, 1776, 1782–1783, 1915–1916, 1953–1954, 2288–2293, 2296–2298, 2349–2351.)

4. Hirst's and Minyo's prior discipline for failing to report resident abuse

On July 11, 2017, Hirst received a first written notice for failing to report an injury to a resident (the cause of the injury was unknown). Hirst received a second and final notice for committing a similar infraction on December 6, 2017. Because of those infractions, Hirst became "hyper diligent" about writing up reports for anything that could be resident abuse. (R. Exh. 22; GC Exh. 34; Tr. 1035–1042, 1080–1081.)

On February 27, 2018, Minyo received an "educational opportunity" for failing to report potential staff abuse of a resident. (GC Exh. KM9; Tr. 1739–1740; see also Tr. 1738–1739, 1777 (explaining that while Respondent does not view an educational opportunity as a formal type of discipline, Respondent does consider previous educational opportunities as a factor for deciding future discipline).) Minyo agreed that she was held to a higher standard (regarding following the policy for reporting potential resident abuse) than other employees because of her position as the assistant director of nursing. (Tr. 874; see also Tr. 1665–1666.)

5. July 15, 2018 – the patient doll incident

On July 15 at around 10:30 a.m., activities assistants Stacy Hayes and Ariana Federici-McCarthy were setting up for lunch and/or doing activities with patients in a common area when a patient (P1) became agitated that another patient (P2) at her table was sleeping. P1 picked up a doll and used it to hit P2, and then threw the doll at P2. No injuries resulted from the incident. Hayes witnessed the incident and grabbed the doll and moved P2 away from the table, while repeating out loud that P1 had hit P2 with the doll. While this incident occurred near the West wing nurses' station, Hirst and Minyo (the nurse and nurse supervisor on duty) were not present at the nurses' station when the incident occurred, and neither Hayes nor McCarthy later informed

Hirst and/or Minyo about the incident.[53] (GC Exhs. 61(g)–(h), 62; Tr. 792–793, 796, 827, 853, 1002, 1525–1527.) At some point later during the shift, an unidentified employee noticed the doll at the nurses' station and asked why it was there. Minyo was present at that time and heard Hayes state that the doll belonged to P1 and was placed at the nurses' station because if P1 had the doll P1 would throw it. (GC Exh. 61(f); Tr. 827; see also Tr. 1006, 2313–2314 (noting that dolls are common on the West wing because they can be a source of comfort for dementia patients on the unit).)

Later in the morning on July 15, a CNA notified Hirst of a new bruise on a patient's (P3) lower leg. Hirst inspected the bruise and reported it to Minyo at around 11 a.m. Minyo investigated (with the assistance of Perry, who was not in the office but was in touch with Minyo by text) and concluded that the bruise likely occurred when P3 was transferred to or from a wheelchair. Respondent's staff made arrangements for someone from the therapy department to pad P3's wheelchair to prevent a similar injury. (GC Exhs. KM1 (pp. 1, 3); KM3; Tr. 826, 1000–1003.)

At approximately 3 p.m. on July 15, Hayes reported the doll incident to Cassie Sousa, who was starting her shift as a nurse on the West wing. Sousa notified Belezarian and Perry about the incident and began an investigation, including gathering statements from all employees who were on duty in the West wing at the time of the incident. (GC Exh. 61(a); Tr. 1531–1533, 1571–1574, 1633–1634, 1674–1675, 2110–2111, 2293–2295.)

6. July 16, 2018 – Respondent begins investigating the patient doll incident and suspends Hirst for failing to report the incident[54]

[53] Relying on statements and testimony from Hayes and Federici-McCarthy, Respondent's position is that both Hirst and Minyo were aware of the doll incident and failed to report it. However, I do not credit Hayes' and Federici-McCarthy's assertions that Hirst and Minyo knew about the doll incident on July 15. Hayes was very inconsistent in identifying who she notified about the incident, starting with a generic written statement that she reported the incident to a nurse, then (at Perry's and/or Belezarian's direction) amending her written statement to indicate that she reported the incident to Hirst, and finally asserting that both Minyo and Hirst were at the nurses' station at the time of the doll incident. (Tr. 1527–1529, 1533–1537, 1600–1602; GC Exhs. 61(a), (g); see also Tr. 1552–1555; GC Exh. 94 (indicating that in connection with an unrelated March 2018 investigation of potential resident abuse, Hayes changed her statement such that it was more favorable to Belezarian's son, who also worked at the facility).) Similarly, Federici-McCarthy was inconsistent with her account, starting with a written statement that described the incident, then (at Perry's and/or Belezarian's direction) amending her written statement to state that Hayes told Hirst about the incident, and finally indicating at trial that while Hirst had been at the nurses' station five minutes before the incident, she was not sure if Hirst was still at the nurses' station when the incident occurred because Federici-McCarthy was attending to a patient and thus was facing away from the nurses' station. (Tr. 792–794, 796–799, 801–802; GC Exh. 61(h).)

By contrast, both Minyo and Hirst were adamant that they were not present when the doll incident occurred and did not hear about the incident until July 16, and Hirst's denial was corroborated by Gomes (who Respondent did not interview). I credit Hirst's and Minyo's testimony. To be sure, on July 15 Minyo heard about P1's tendency to throw the doll, but that was the extent of her knowledge and it does not follow that Minyo should have inferred that a potential abuse incident occurred (as opposed to, say, P1 throwing the doll on the floor). (Tr. 1233–1235; GC Exhs. 61(e)–(f), KM4.)

[54] Regarding the events of July 16-17, I note that I did not credit Belezarian's testimony about

In the morning on July 16, Perry and Belezarian met and reviewed the written statements that Sousa obtained from Hayes and Federici-McCarthy about the doll incident between P1 and P2. The statements (before any subsequent edits) read as follows:

> [Hayes]: Sunday at 10:30ish I was setting up for lunch and cleaning activities items when [P1] started to get mad at [P2] for sleeping, then picked up a doll and hit [P2] with it and proceeded to throw it at [P2]. I grabbed the doll took it away while reporting it to nurse several times and moving [P2] to another table for her safety.

> [Federici-McCarthy]: Sunday @ 10:30 am ish, I was doing activities with other residents when I noticed [P1] started getting frustrated that [P2] was sleeping at the table. [P1] was waving the doll at [P2] and proceeded to hit [P2] with the doll. The other activity aid[e] Stacey removed [P2] from the table for her safety.

(GC Exhs. 61(g)–(h); see also Tr. 1677, 1680, 2112, 2295–2296.)

Perry and Belezarian subsequently met (separately) with Hayes and Federici-McCarthy on July 16 to discuss the doll incident. Among other questions, Perry asked both Hayes and Federici-McCarthy which nurse Hayes told about the incident. Hayes and Federici-McCarthy each stated that Hayes told Hirst about the doll incident and added the following language to their written statements:

> [Hayes]: Told Nurse Karen was nurse of both residents.

> [Federici-McCarthy]: Stacey told the nurse Karen about the incident between [P2] and [P1]

(GC Exhs. 61(g)–(h); Tr. 1680–1685, 1774–1785, 2112–2115, 2299; see also Tr. 1684 (noting that Federici-McCarthy did not report the doll incident but reported hearing Hayes do so).)

Next, Perry telephoned Hirst (who was on her day off) and left a message for Hirst to call her back. When Hirst called back, Perry asked about the doll incident and why Hirst did not report it after being notified by Hayes. Hirst responded that she had no idea what Perry was talking about. When Perry explained that she was asking about the doll incident and noted that she had witness statements indicating that the incident happened at around 10:30 a.m., Hirst stated that she was not aware of the doll incident and asserted that had she been notified she would have reported it in the same manner that she reported the patient bruise that was observed the same morning. Hirst added that she thought she was being targeted. Perry asked Hirst to provide a written statement, and also advised that Hirst was suspended pending an investigation of the doll incident and whether Hirst failed to report it. (Tr. 820–821, 861–862, 1003–1006, 1077–1078, 1087, 1686, 1747–1750.)

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various details (such as the dates of conversations with Minyo and the circumstances of those conversations). Belezarian's testimony on those points conflicted with other credible evidence, including testimony provided by Perry, who was one of Respondent's witnesses.

After the call with Perry, Hirst called Gomes. When Hirst explained that she was told that the doll incident happened at 10:30 a.m., Gomes reminded Hirst that the two of them were on break at that time. Accordingly, Hirst texted her coworkers to see if they could write statements supporting Hirst's position that she was on break when the doll incident occurred, and attempted to email Respondent's CEO, Lisa Sofia, about the situation.[55] (Tr. 1007–1018, 1074–1077, 1233–1235; GC Exhs. KH7, KH8(a).) Hirst then drove to the facility to deliver the following written statement about the doll incident:

> Heather Perry, [director of nursing] called me and left a message in my answering machine to call her back about a patient incident on 7/15/18.
>
> I returned her call thinking it was regarding an incident with [patient and CNA] that I had reported that happened on 7/15/18. Then I was completely stunned to hear it was about a [patient to patient incident with P1 and P2]. I had absolutely no idea what she was talking about. It was never reported to me, that is why I didn't report it. Incident supposedly happened at 10:30 am, I left for break at 10:20, which I have witnesses [to]. I returned at 10:50. Nothing was said to me upon my return. Katie Minyo, LPN, was on the floor during that time and she did not report anything to me either. [P2] was in a pleasant mood all day while sitting at the table [with P1]. My nursing documentation states that [patient] had no behaviors.

(GC Exh. 61(e); see also Tr. 1011, 1017–1018, 1026–1027.)

Later on July 16, Belezarian and/or Perry contacted Hayes by phone and asked why Hayes did not notify Minyo about the doll incident (since Hayes was aware that Hirst did not start investigating the incident). Hayes asserted that Minyo was present at the nurses' station when Hayes reported the doll incident to Hirst. (GC Exh. 61(a).)

Next, Perry and Belezarian met with Minyo about the doll incident. Minyo explained that she did not hear anything about P1 hitting P2 with a doll. Minyo did note, however, that later in the day on July 15, she heard Hayes say that a doll belonging to P1 was at the nurses' station because P1 would throw the doll if P1 had it. Perry and Belezarian asked Minyo if she asked any more questions about the doll, and Minyo indicated that she did not. (Tr. 827, 855–856, 860, 1677–1679, 1746, 1751–1752, 2115–2116; see also 816–817, 855 (noting that Minyo heard about the doll incident for the first time when it came up during a managers' meeting in the morning of July 16).)

Belezarian then contacted Veno to notify him about the doll incident, the alleged failures to report the incident, and the suspension of Hirst and potential suspension of Minyo pending the completion of the investigation. Veno and Belezarian also discussed the fact that Belezarian and Minyo had a pre-existing friendship that might pose a conflict of interest for Belezarian. To

[55] It is unclear whether Sofia received Hirst's emails, which were sent to an email address that spelled Sofia's last name as "Sophia." (GC Exh. KH8; Tr. 1023–1025.) I need not resolve that question here – Hirst's emails are relevant here only to demonstrate Hirst's state of mind at the time she sent the emails.

address that concern, Veno agreed to come to the facility later in the week to make the final decision on any disciplinary action. (Tr. 2410–2413, 2496–2497.)

Finally, in the late evening on July 16, Minyo texted Belezarian to follow up about the doll incident and whether/how it was reported. Minyo stated as follows in her text:

> I was so behind in med pass at that time. I am sure there is a way to see when meds were signed off. [A]lso we reported [a] bruise to Heather at after 12 so if this was reported to Karen I know she would have said something. [W]e obtained statements for the bruise and nothing was mentioned about statements for an incident very strange.

(GC Exh. KM2; Tr. 823–824; see also FOF, Section II(W)(5), supra (describing Hirst's and Minyo's reporting of the patient bruise on July 15).)

7. July 17, 2018 – Respondent suspends Minyo for failing to report the doll incident

On July 17, Perry called Minyo and asked her to provide a written statement about the doll incident. Minyo sent in the following statement:

> I have no knowledge of any incident on July 15 regarding residents.

(GC Exh. KM4; see also Tr. 828, 856–857.) Perry called Minyo to advise that Minyo's statement was not acceptable and that Minyo needed to provide information about the doll that was at the nurses' station. Accordingly, Minyo sent in the following additional statement:

> I was unaware of the incident regarding the doll. At one point throughout the day someone asked who the doll at the desk belonged to. Stacey replied [it's P1's] doll, it's there because [P1] will throw it.

(GC Exh. 61(f); see also Tr. 828–829, 1690–1691, 1750–1751, 2116.) After receiving Minyo's second statement, Perry notified Minyo that she (Minyo) would be suspended pending investigation of the doll incident and how it was reported. (Tr. 829–830.)

8. July 18, 2018 – Respondent decides to terminate Hirst and Minyo for failing to report the doll incident

On July 18, Veno and Belezarian decided that based Hirst's and Minyo's disciplinary records and the statements provided by Hayes and Federici-McCarthy, both Hirst and Minyo should be terminated for failing to report the doll incident (and thereby start an investigation of potential resident abuse). At the time, Hirst had two disciplinary actions in her file (dated July 11, 2017, and December 6, 2017) for failing to report abuse, the last of which was a final disciplinary notice. Minyo, meanwhile, had one "educational opportunity" (dated February 27, 2018) in her file for failing to report abuse, but was terminated because Respondent maintained Minyo should be held to a higher accountability standard as a member of management. (Tr. 842–843, 2117–2118, 2318, 2413–2415, 2497–2502, 2539–2540; GC Exhs. 34, KM9; R. Exh.

22; see also Tr. 1752–1755 (indicating that Perry did not recommend firing either Hirst or Minyo).)[56]

Later on July 18, Perry notified Hirst and Minyo that they each (separately) should come to the office for a meeting on July 19 to discuss what disciplinary action Respondent would take based on the alleged failures to report the doll incident. (Tr. 1027–1028, 2119, 2415.) Belezarian, however, also contacted Minyo to advise that Minyo would be terminated at the meeting. When Minyo responded that she wanted to postpone the meeting to July 20 so she could have a lawyer accompany her to the meeting, Belezarian suggested that Minyo contact Perry to ask about rescheduling.[57] Accordingly, Minyo called Perry and left a voicemail indicating that she could not come in for a meeting until July 20. Perry responded by leaving a voicemail for Minyo that the meeting on July 19 would proceed as scheduled, but it is unclear whether Minyo received Perry's voicemail. (Tr. 830–832, 834, 857–858, 1695–1696, 2119–2120; GC Exh. KM7 (p. 1).)

9. July 19, 2018 – Respondent terminates Hirst and Minyo

In the morning on July 19, Minyo did not appear for the disciplinary/termination meeting that Perry scheduled. Accordingly, human resources director Kevin Ortiz contacted Minyo by telephone to advise her that she was terminated for failing to report the doll incident. (Tr. 836–837, 2417–2418, 2496; GC Exh. 60; see also GC Exh. KM7 (text message exchange in which Minyo asserts that Belezarian misled her about being able to reschedule the disciplinary meeting); Tr. 838–839.)

On the same day, Veno and Ortiz met with Hirst and notified her that she was being terminated for failing to report the doll incident based on the statements of two employees. When Hirst asked Veno if he spoke to Gomes to confirm that Hirst was on break when the doll incident occurred, Veno responded that he did not do so.[58] (Tr. 942, 1028–1033, 1043, 2415–2417, 2496; GC Exh. KH10.)

[56] I do not credit Belezarian's testimony that she and Perry made the decisions to terminate Hirst and Minyo. (Tr. 2117–2118.) Respondent's own witnesses (specifically Perry and Veno) establish that while Perry participated in the investigation, Belezarian and Veno made the final decisions to terminate Hirst and Minyo.

[57] Minyo also testified that in the same phone call, Belezarian suggested that Minyo could avoid termination and simply receive a written warning if she (Minyo) admitted to failing to report the doll incident (Minyo refused that suggestion because she was unwilling to lie about the incident). (Tr. 830–834.) I do not credit that testimony. Belezarian denied telling Minyo to lie about the doll incident. Perhaps more important, when Minyo texted Belezarian on July 19 after learning that she missed her termination meeting, Minyo did not mention anything about Belezarian suggesting that she (Minyo) lie about the doll incident. (See GC Exh. KM7; Tr. 2120.) That omission tips the scales in favor of Belezarian's description of the July 18 telephone conversation.

[58] Hirst's testimony on this point (whether Veno spoke to Gomes) is unrebutted, and I credit it. I add that I do not credit Veno's testimony that he asked Hirst if she had a statement and Hirst said yes but declined to turn it in. (Tr. 2417, 2499.) The evidentiary record shows that Hirst turned in her statement to Perry on July 16, so Hirst's statement was already part of Respondent's investigatory file. (See, e.g., GC Exh. 61(a) (Belezarian's summary of the investigation, which references Hirst's statement).)

10. Additional reports by Respondent concerning Hirst's and Minyo's terminations

On or about July 19, Belezarian wrote a summary of Respondent's investigation into whether Hirst and Minyo failed to report the doll incident. The summary states as follows:

> It was reported to charge nurse and SDC Cassie Sousa on Sunday July 15, 2018 @ 3pm by C.N.A. Stacy Hayes that [P1] threw a doll at [P2] and made physical contact with [P2].
>
> Stacy's statement said that she reported it to charge nurse Karen Hirst but when she wasn't asked to write a statement pertaining to the investigation she reported it to the charge nurse on the upcoming shift.
>
> [Assistant Director of Nursing (ADON)] Katie Minyo was present as the second nurse on the shift of the occurrence.
>
> Stacy was interviewed via phone and asked why she didn't report the incident to the ADON when [Hirst] didn't react to her statement of the patient to patient [incident].
>
> Stacy stated that she didn't know why she didn't bring it to [Minyo's] attention again prior to the shift being over but that [Minyo] was present when she initially reported it to [Hirst].
>
> Karen Hirst was interviewed by phone and she stated that she was unaware of any patient to patient that took place and her statement also reflects the same.
>
> Activity aide [Federici-McCarthy] was also present and statement states that she witnessed Stacy Hayes reporting it to the nurses.
>
> Both nurses were suspended.
>
> Karen Hirst's file was reviewed and she had a final warning for failing to report allegation of abuse.
>
> ADON Katherine Minyo also had a prior warning for reporting issues.
>
> Both employees were terminated.

(GC Exh. 61(a); see also Tr. 2293, 2312–2313.)

At some point after July 19, Respondent answered Minyo's application for unemployment benefits by asserting that it terminated Minyo for missing a meeting. (Tr. 839, 2502–2504.) On August 10, 2018, the Massachusetts Executive Office of Labor and Workforce Development, Department of Unemployment Assistance (the Department) issued a notice approving Minyo's application for unemployment benefits and providing the following reasoning:

> Because [Respondent] failed to provide sufficient separation information regarding [Minyo's] attendance at a meeting, it cannot be determined that [Minyo's] discharge was for deliberate misconduct in willful disregard of the employing unit's interest or for a knowing violation of a reasonable and uniformly enforced company rule or policy.

(GC Exh. KM8; see also Tr. 839–840.)

11. Comparator evidence – discipline for failing to report resident abuse

On about March 24, 2018, Hayes told Belezarian that one month earlier (i.e., around February 24),[59] she was at the nurses' station and heard coworker M.A. talking about a potential resident abuse incident that was not reported. Specifically, Hayes heard M.A. say that Christopher Beauregard (Belezarian's son, who is also an employee at the facility) placed his finger over a resident's mouth to stop the resident from yelling. Hayes subsequently provided a written statement that stated as follows:

> [M.A.] was at nurses' station and she was mad at [Beauregard]. She said if she ever gets in trouble for calling out she has so much "crap on him." He even covered [a] resident's mouth. . . . As for who was there its been months (2–3) so I don't remember what staff was on and who was around but it was around 9ish.

(GC Exh. 94; see also Tr. 1552–1553, 2173–2174.) Another employee (H.C.) acknowledged that one month earlier she also overheard M.A. say an allegation about Beauregard trying to quiet a resident. H.C. did not report the conversation as evidence of an incident of potential resident abuse. (GC Exh. 95(a)–(b).) M.A. denied making the remarks in question. (GC Exh. 95(d).)

Ultimately, Belezarian investigated the report that Beauregard abused a resident and deemed the report to be unfounded.[60] In her summary of the investigation, Belezarian noted that Hayes provided contradictory statements about when she heard M.A.'s remarks about Beauregard. (GC Exh. 95(a); Tr. 2174–2176, 2356.)

As for how Respondent addressed employees' failures to report the allegations concerning Beauregard, Respondent did not discipline Hayes for failing to report the allegations in a timely manner. Respondent suspended H.C. and M.A. pending investigation of the allegations, but there is no evidence that Respondent subsequently took formal disciplinary action against H.C. or M.A. for failing to report the allegations. (Tr. 2176, 2309, 2353; GC Exh. 95(a); see also Tr. 998, 2307–2308, 2404, 2486–2487 (explaining that Respondent typically suspends employees pending investigation, but if the investigation shows that the employee is not at fault then Respondent brings the employee back with retroactive pay).)

[59] I do not credit Belezarian's testimony that Hayes reported M.A.'s remarks on the same day that Hayes heard them. (See Tr. 2174, 2300–2302, 2309, 2352–2354.) Hayes' statements explicitly state that Hayes heard M.A.'s remarks one to three months before reporting them, and H.C.'s statement corroborates that timeline. (See GC Exhs. 94, 95(a)–(b); Tr. 1552–1553.)

[60] At some point during the investigation, Hayes added the following comment to her written statement: "After working with [Beauregard] I believe that he is innocent and would never hurt a resident at all. He is always helping a resident and other coworkers." (GC Exh. 94; see also Tr. 1553–1554.)

X. Additional Efforts to Contest Respondent's Decision to Withdraw Recognition

In July 2018, the Union continued to circulate its counter petition to show that the Union still had the support of a majority of employees in each bargaining unit. Several employees signed the petition, including nine members of the service and maintenance employees' unit and one member of the RN unit who previously signed the decertification petition.[61] On July 26, a group of employees presented the counter petition to Belezarian as evidence that the Union retained majority support, but Respondent did not change its decision to withdraw recognition of the Union. (GC Exhs. 30, 36; R Exh. 34; Tr. 40–42, 54–55, 63, 98–99, 149–150, 192–194, 210–211, 263–264, 383–384, 396–398, 450–456, 487–490, 561–563, 632–633, 747–749, 895–898, 928, 1062, 2122–2128, 2183–2185, 2418–2420.)

Victoria Palmer was one of the employees who signed both the decertification petition and the Union's counter petition. After Palmer signed the counter petition in or about early-July, Palmer went to Belezarian's office to let Belezarian know she had done so, and to ask if she could get in trouble for having signed both petitions. Belezarian advised Palmer that she could not get in trouble for signing or not signing a petition.[62] (Tr. 194–195, 211–212, 2183–2186, 2274.)

Y. November 14, 2018 – Dawn Nunes' Discipline

1. Background – Dawn Nunes

Dawn Nunes began working as a registered nurse at the Country Gardens facility in 2005, and typically worked on the East wing. Nunes joined the Union in 2015, and began serving as a union delegate at that time. As a delegate, Nunes has (among other things): assisted coworkers with issues in the workplace; handled grievances; and attended labor-management meetings. (Tr. 430–432, 939–940, 1089, 1092, 1126, 1191, 1236, 1264.)

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[61] If the dual signers (employees who signed both the decertification petition and the Union's counter petition) are not counted as signers of the decertification petition, then only 20 out of 46 members of the service and maintenance employees' unit and 2 out of 6 members of the RN unit signed the decertification petition. However, in a decision issued after the trial in this matter, the Board held that an incumbent Union may not "defeat an employer's withdrawal of recognition . . . with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal." *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 2 (2019) (noting that a Union that maintains it reacquired majority status may petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition). Although the facts in *Johnson Controls* differ from the facts in this case (including the fact that Respondent did not merely notify the Union that it intended to withdraw recognition, but instead immediately withdrew recognition before the collective-bargaining agreements expired), the Board's decision in *Johnson Controls* certainly raises questions about the legal significance of the Union's counter petition and the extent that it undercuts the decertification petition.

[62] Palmer testified that Belezarian warned that Palmer could get in trouble for signing both the decertification petition and the Union's counter petition. (See Tr. 195, 211–212.) However, since I found both Palmer and Belezarian to be credible on this point, I have credited Belezarian's account of the conversation since the General Counsel bears the burden of proof and did not meet that burden here.

Nunes continued to serve as a union delegate after Respondent withdrew recognition of the Union on July 6. For example, on July 9, Nunes and a group of other employees met with Veno and Belezarian to state that they still supported the Union and to voice their opposition to Respondent's decision to suspend Sullivan earlier that day. Nunes also assisted with circulating the union support petition in mid-July 2018, and was part of a group of employees that presented the union support petition to Belezarian on July 26. Further, after Respondent terminated Sullivan and Hirst in July 2018, Nunes was one of the few remaining delegates that employees could contact about workplace issues. (Tr. 447–456, 490, 1126, 1191, 1236–1237; see also GC Exh. 30 (union support petition).)

In general, both employees and managers viewed Nunes as a competent and experienced nurse. Nunes, however, did not socialize with many of her coworkers, instead opting to keep conversation to a minimum and focus on doing her job efficiently. In addition, Nunes at times engaged in conduct that some other East wing nurses found to be rude, including (for example):

being "short" when providing or receiving the report during shift changes, including having her back turned and/or talking to other coworkers during report;

being "short" when other nurses asked questions;

calling a physician and ending the call without asking if the other nurse on duty also needed to speak to the physician;

reviewing the work completed by other nurses;

not reporting lab results to the physician during her shift, and thereby leaving that task for the oncoming nurse to complete;

restock her nurse's cart with supplies (e.g., water, nutritional shakes) without also restocking the other nurse's cart;

and making or changing CNA assignments without consulting with the other nurse on duty.

There is little evidence that any nurses complained to management, the Union or to Nunes about these issues before November 2018. (Tr. 1108–1111, 1114–1115, 1122, 1147–1148, 1152, 1155, 1157–1159, 1168–1169, 1188–1189, 1237, 1240, 1244–1245, 1364–1368, 1444–1445, 1447–1448, 1512–1513, 1613, 1815, 1818–1819, 1857–1858, 1997–1998, 2558–2559; see also Tr. 2002–2003, 2021 (nurse Kerry Nault testimony that she verbally complained to someone in management about Nunes a couple of times in about 2016 or 2017).)[63]

[63] Nunes did not dispute that she engaged in some of this conduct but maintained that it was not unusual. For example, Nunes explained that: her back is turned during report because the nurses' station is configured in a way that nurses on the same team sit at a right angle to each other if they are each facing their computers; she may not be at the nurses' station when she telephones a physician about a patient; and that she has notified management about medication errors made by other nurses because she is obligated to report those types of errors. (See Tr. 1102–1105, 1111, 1119–1121, 1168–1169; see also Tr. 1258 (noting that the nurse who replaced Nunes on the East wing takes report in the same way Nunes

2. November 13, 2018 – three nurses submit complaints about Nunes

On or about November 7, 2018, Sousa notified Belezarian that a few nurses were thinking about resigning because they were having problems with Nunes and Gomes and their professionalism in the workplace. Belezarian contacted Veno to advise him of the issue, and Veno asked Belezarian and Sousa to investigate. (Tr. 1587–1588, 2159–2160, 2432–2433, 2512–2513, 2554–2556.)

On November 13, 2018, three nurses submitted written complaints about Nunes and her conduct in the workplace (no complaints were submitted about Gomes). The complaints about Nunes stated as follows:

> [Celina Caseiro]: I am writing this statement to inform you that I do not feel comfortable working with Dawn N. on the East wing at Country Gardens. This person has no respect and a bad attitude when speaking to myself and other staff. During report, labs are rarely reported on this person's time because this person waits until shift is over to call the MD. It is unfair to worry about my shift and also the issues prior to my shift. I am a fairly new nurse and I feel uneasy asking questions to this nurse, fearing the answer. The phrase "Nurses eat their young" applies to this nurse for the reasons stated above.
>
> [Gina Picard]: I am writing this letter to inform you that I no longer feel comfortable working with Dawn Nunes. I always feel that she is reviewing my work and questioning my competency as a nurse. For some reason Dawn is always looking for a way to jeopardize my position at Country Gardens, and this makes me uncomfortable. I should not have to be [constantly] looking over my shoulder in the workplace.
>
> [Kerry Nault]: I am writing this because [of] my concern with coworker Dawn Nunes, RN. I feel that when you talk to her she is not responsive to you. Her attitude is very unprofessional towards her coworkers. During report she sits [with] her back turned towards you so I feel that she is not even listening to me, and also starts to have conversations [with] CNAs [and] nurses during report. I have considered looking for a new job due to hostile environment I work in.

(R. Exhs. 31–33; see also 1588–1589, 1614, 1815–1821, 1833, 1858–1863, 2003–2008, 2010, 2160–2163, 2555–2556.) Caseiro, Picard and Nault each supported the June 2018 decertification petition and did not support the Union. (Tr. 1255; Jt. Exh. 29; see also FOF, Section II(O)(1), supra.)

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did and does not notify other nurses when she telephones a physician).)

3. November 14, 2018 – Respondent disciplines Nunes

On November 14, 2018, Veno reviewed the complaints that Caseiro, Nault and Picard submitted about Nunes (Veno received Nault's complaint by email on November 13, and received Caseiro's and Picard's complaints when he arrived at the facility on November 14).[64] Afterwards, Veno, Belezarian and Sousa met to discuss the complaints and decided that because Nunes engaged in conduct that created a hostile work environment they would issue Nunes a final disciplinary notice and transfer her to the West wing for a 90–day monitoring period. Respondent did not speak to (or obtain a statement from) Nunes about the complaints before deciding to take disciplinary action. (Tr. 2161–2163, 2433–2434, 2438–2439, 2510, 2514, 2516, 2518, 2570–2571.)

In the afternoon on November 14, Respondent asked Nunes to come to the administrator's office for a meeting with Veno, Belezarian and Sousa. Nunes believed that she was going to be fired, and thus delayed coming to the meeting for around 30 minutes so she could finish the essential tasks remaining on her shift. At Nunes request, Gomes also attended the meeting. (Tr. 1132–1133, 1177–1179, 1193–1194, 1240–1242, 1589–1590, 1597–1598, 1615–1616, 2163–2164, 2434–2435.)

At the start of the meeting, Veno stated that he had received multiple complaints from other nurses about Nunes being intimidating and creating a hostile work environment. Gomes asserted that Respondent was targeting union delegates, but Veno told her to shut up because she was only in the meeting as a courtesy. Nunes objected to Veno speaking to Gomes in that manner and Veno apologized. Next, Nunes stated that this was the first she was hearing about the issue and asked for examples. Veno noted that nurses said Nunes was "short" when she spoke with them, did not notify other nurses when she called a physician, and did not face the nurses when giving or receiving report during shift changes. (Tr. 1135–1139, 1179, 1243–1244, 1249, 1267–1268, 1590, 2164–2165, 2434–2436, 2510, 2513–2514.)

[64] Veno expected to receive a statement about Nunes from Birch but did not receive Birch's statement before disciplining Nunes on November 14. (Tr. 2438–2439, 2512, 2556–2558.) At some point after the November 14 disciplinary meeting with Nunes, Birch submitted the following written complaint to Belezarian:

> I am writing this letter to inform you that I cannot work with East wing nurse Dawn N. any longer. I believe she creates a hostile work environment for myself and the [aides] on the floor. She is unwilling to communicate about patients and does not pass appropriate information on in report. In addition she will contact the Doctor without telling me or asking if I need to speak with him. She will come in early and fill the daily C.N.A. [assignments] out without consulting with me. Due to our difference in opinion concerning working for a union she has been downright rude and unprofessional when we are scheduled together. I feel that the patients' care and safety is compromised. Two nurses should be communicating the entire shift and working together to provide the best care possible for the patients at Country Gardens.

(R. Exh. 30; see also Tr. 1445–1449.)

Veno next advised Nunes that Respondent was issuing her a final disciplinary notice and transferring her to the West wing for 90 days, after which time Respondent would evaluate Nunes' conduct and consider whether Nunes should return to the East wing. (Tr. 1141–1142, 1149, 1249, 1252, 1271–1273, 1590, 2165, 2437–2438, 2513–2515.) The disciplinary notice stated as follows:

> [Work rule violated]: Prohibition Against Discrimination & Harassment (Hostile Work Environment)
>
> [Description]: Four nurses on varying shifts have made formal complaints regarding Ms. Nunes' unprofessional attitude, interruption and distractions during shift report and other actions leading to a hostile work environment.
>
> [Discipline Issued]: Final Notice. Dawn will be immediately transferred to alternate unit and will be monitored for professional conduct for 90 days.

(GC Exh. DN1; see also Tr. 1144–1146, 2440 (noting that Nunes did not receive a copy of the disciplinary notice until early December 2018).)

Nunes objected to being given a final notice because no one previously brought the issue to her attention. Veno responded that the discipline was in response to a very serious allegation and stated that just like union delegates can file complaints, other employees can file complaints. Veno then asked Nunes to provide a written statement but Nunes declined, in part because she needed to get to her second job. (Tr. 1137, 1141–1144, 1147, 1149–1150, 1251–1253, 1618, 2165–2166, 2437–2438; see also Tr. 1147–1148, 1252 (noting that no managers or coworkers spoke to Nunes about any concerns related to her workplace conduct before the November 14 meeting).) Nunes had no record of prior discipline in the 18 months before receiving the final disciplinary notice and 90–day transfer. (GC Exh. DN1; Tr. 1613, 2516–2517, 2558–2559; see also Tr. 1153–1154 (noting that the only discipline Nunes ever received was at some point receiving an educational opportunity for giving a nebulizer treatment to a resident in the common area of the unit).)

4. March/April 2018 – Nunes returns to the East wing

In about March or April 2018, Respondent transferred Nunes back to the East wing, in part because Nunes worked on the West wing without incident. Respondent also removed the final notice from Nunes' file and advised Nunes (but not the Union) of that fact. (Tr. 2166–2167, 2320–2321, 2440–2443; see also Tr. 1130, 2166–2167, 2439–2440 (explaining that Nunes' stint on the West wing lasted for longer than 90 calendar days because Nunes took leave for a period of time before starting the 90–day transfer period).)

5. Comparator evidence – discipline for conduct towards coworkers

The evidentiary record does not include any specific examples of how Respondent has handled other complaints that an employee is creating a hostile work environment for his or her coworkers. Veno acknowledged that one option for handling such issues is to simply speak to

the employees involved about the need to get along in the workplace, but noted that management's specific approach would depend on the circumstances. (Tr. 2553–2554; see also Tr. 2320 (noting that when Nunes returned to the East wing in 2019, Respondent spoke to her and Birch about the need to get along with each other).)

6. Policies and practices for investigating allegations of employee misconduct that do not involve alleged resident abuse

The evidentiary record does not include any written policies that govern how Respondent should investigate allegations of employee misconduct that do not involve allegations of resident abuse. However, as a matter of practice, when such allegations of employee misconduct do arise, Respondent generally gathers statements from all witnesses including the employee accused of misconduct, preferably with the statements in writing. Veno testified, however, that it is permissible for Respondent to request a statement from the accused employee during the meeting in which Respondent announces its disciplinary decision. Veno added that there have been occasions where he has reversed a disciplinary decision after receiving the accused employee's statement. (Tr. 1668–1670, 1772, 2479–2481, 2509, 2528–2529, 2532–2534.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 860. My credibility findings are set forth in the findings of fact for this decision.

B. Did Respondent Violate the Act by Increasing the Starting Wage Rates for New Hires without also Offering an Equal or Higher Wage Rate to Existing Employees with the Same or Greater Experience?

1. Complaint allegations

The General Counsel alleges that since about January 26, 2018, Respondent has violated Section 8(a)(5) and (1) of the Act (within the meaning of Section 8(d) of the Act) by, without the Union's consent, hiring new employees in the service and maintenance employees' bargaining unit at wage rates above those set forth in the collective-bargaining agreement without also paying those higher wages to existing employees with the same or greater experience. In the alternative, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the

Act by unilaterally taking these actions without first notifying the Union and affording an opportunity to bargain. (GC Exh. 50 (pars. 22, 25, 33–34).)

2. Summary of facts

Under the collective-bargaining agreement for the service and maintenance employees' unit (which was in effect from November 1, 2016, through October 31, 2018), Respondent could hire new employees at wages that exceeded the starting rates set forth in the collective-bargaining agreement. However, if Respondent exercised that option, the collective-bargaining agreement required Respondent to pay an equal wage rate to any current employees in the same job classification that have the same or more experience with Respondent than the new hire. (FOF, Section II(C)(2) (noting that the collective-bargaining agreement states that the starting wage rate for CNAs is $11.50 per hour).)

On or before February 20, 2018, Respondent hired Chris Beauregard as a full-time CNA in the bargaining unit at a wage rate of $14.10 per hour (the same rate that Beauregard had been earning as a per diem CNA). Similarly, Respondent hired Victoria Palmer and Nicole Talbot as full-time CNAs at wage rates that exceeded the starting rates specified in the collective-bargaining agreement (Palmer was hired by February 28, 2018, at $14.10 per hour; Talbot was hired on April 21, 2018, at $14.00 per hour). When making those hires, Respondent did not pay equal or higher wage rates to current CNAs that had the same (or more) experience as Beauregard, Palmer or Talbot. There is no evidence that the Union consented to Respondent modifying the collective-bargaining agreement terms concerning this issue, and there is no evidence that Respondent notified the Union and afforded an opportunity to bargain about the change to Respondent's wage practices. (FOF, Section II(F)(1), (H), (K)(1); see also FOF, Section II(F)(1) (noting that while Respondent, in 2017 and 2018, hired new LPNs at wages above the starting rates specified in the collective-bargaining agreement, the evidentiary record did not show that any current LPNs with the same or more experience were being paid less than the new hires).)

3. Applicable legal standard

The General Counsel has alleged that Respondent, through its wage practices, violated the Act by modifying a provision in the collective-bargaining agreement, or alternatively by unilaterally changing wage policies and practices. Recently, however, the Board held that the unilateral change and contract modifications are mutually exclusive, such that the judge should analyze alleged misconduct under only one of the theories. For example, if the dispute relates to a contractual matter that is covered by the parties' collective-bargaining agreement, then the contract modification theory applies and the unilateral change theory does not. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 6–7 (2019) (explaining that if an employer modifies a collective-bargaining provision without the union's consent, then the employer's act is unlawful under the contract modification theory even if the employer had given the union notice and an opportunity to bargain); see also *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005) (explaining that the "unilateral change" theory and the "contract modification" theory "are fundamentally different in terms of principle, possible defenses, and remedy"), enfd. 475 F.3d 14 (1st Cir. 2007).

I find that the complaint allegation here concerning starting wage rates must be analyzed under the contract modification theory. The collective-bargaining agreement for the service and maintenance unit has an explicit provision that establishes starting rates and specifies the steps that Respondent must take if it hires employees into bargaining unit positions at wage rates that exceed the starting rates. Accordingly, I recommend that the General Counsel's alternative unilateral change theory concerning wage rates be dismissed.

In a "contract modification" case, "the General Counsel must show a contractual provision, and that the employer has modified the provision" without the union's consent. *Bath Iron Works Corp.*, 345 NLRB at 501. Where the issue in dispute turns on the resolution of two conflicting interpretations of the collective-bargaining agreement, the Board will not find a violation if the employer has a sound arguable basis for its interpretation of the agreement and is not motivated by union animus or acting in bad faith. Id. at 502; see also *American Electric Power*, 362 NLRB 803, 805 (2015) (noting that in the absence of evidence of bad faith, animus or an intent to undermine the union, the Board does not seek to determine, in a contract interpretation dispute, which of two equally plausible contract interpretations is correct).

In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017); *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994)

4. Analysis

Turning to the merits of the General Counsel's contract modification theory, I note that the collective-bargaining agreement for the service and maintenance unit permits Respondent to hire CNAs at a higher starting wage than the $11.50 per hour rate specified in the contract. The contract explicitly states, however, that if Respondent does hire a CNA at a higher starting wage, then Respondent must also provide that same higher wage to any current CNAs with the same or greater experience with Respondent. Respondent did not abide by that contract provision when it hired Chris Beauregard on February 20, 2018, at a wage of $14.10 per hour, nor did Respondent do so when it subsequently hired Victoria Palmer (on or before February 28, 2018; $14.10 per hour) or Nicole Talbot (April 21, 2018; $14.00 per hour). Indeed, multiple CNAs (including Hyacinth Campbell, Stacy Hayes and Sherry Martin) with the same or more experience with Respondent continued to work at lower hourly wages even after Respondent hired Beauregard, Palmer and Talbot as full-time CNAs.[65]

The General Counsel further asserts that Respondent committed the same violation with LPNs, but the General Counsel's proof on that point falls short. The General Counsel demonstrated that Respondent hired three LPNs (Birch, Caseiro and Picard) at starting wages

[65] To be sure, Respondent did increase Campbell's, Hayes' and Martin's wages on May 30, 2018, effective retroactive to May 20, 2018. Those wage increases, however, were months overdue, and also were only to $14.00 per hour (instead of $14.10).

that exceeded the $20.50 starting rate specified in the collective-bargaining agreement. That evidence alone does not establish a contract modification, however, because the collective-bargaining agreement permits Respondent to hire bargaining unit members at starting wages that exceed the rates specified in the agreement. To establish a contract modification, the General Counsel also needed to show that upon hiring Birch, Caseiro and/or Picard, Respondent failed to abide by the contractual obligation to provide the higher wage to current LPNs with the same or more experience. Since the General Counsel did not make that showing, I recommend that the allegation that Respondent modified the contract regarding LPN starting wages be dismissed.

Returning, then, to Respondent's handling of CNA wages, Respondent asserts that there is a sound and arguable basis for Respondent to interpret the collective-bargaining agreement as permitting Respondent to pay higher starting wages to new CNAs without offering that same wage to current CNAs with the same or more experience. In support of that argument, Respondent relies on the following contract language:

> The Employer may hire above the minimum start rate. If the employer hires an employee above the minimum start rate, based on their qualifications and years of experience, current employees in the classification with the same or greater experience with the Employer shall be paid no less than the new employee. (See Jt. Exh. 1 (Art. 5.1).)

Relying on that contract language, Respondent maintains that the contract only requires Respondent to increase current CNA wages if Respondent offered a newly hired CNA a higher wage *because of their qualifications and experience*. If, however, Respondent offered a newly hired CNA a higher starting wage for any other reason, then Respondent has no obligation to offer the higher wage to current CNAs. (See R. Posttrial Br. at 37–39.)

Respondent's argument relies on an unreasonable and implausible interpretation of the contract, and accordingly I reject it. Reasonably read, the contract sets minimum starting wages but permits Respondent to offer higher starting wages to new CNA hires based on their qualifications and experience[66] as long as Respondent provides that same higher wage to any current CNAs with the same level of experience. Respondent's proposed reading of the contract would jettison that basic framework and permit any of the following reasons (among a myriad of others) to serve as a justification for paying higher wages to new CNAs without also offering the higher wage to current CNAs:

> The newly hired CNA received a higher wage because:
> Respondent was hiring to address a staffing shortage;
> the CNA wore a green shirt to his job interview;
> the CNA was born in August; or
> the CNA grew up in Texas.

[66] The contract permits Respondent to decide what qualifications and experience (including no remarkable qualifications or experience) should prompt a higher CNA starting wage and the accompanying obligation to raise wages of any current CNAs with the same or more experience. When Respondent offered higher starting wages to CNAs with little notable qualifications and experience (e.g., 1 year of experience or less), that was sufficient to create the obligation to offer the same rate to current CNAs with the same or more experience.

Relying on the contract language, I do not find that the parties intended to allow these types of exceptions to the basic premise that Respondent may offer higher wages to new CNA hires provided that Respondent also gives that higher wage to current CNAs with the same or more experience.

Since Respondent's sound and arguable basis defense fails, I find that on February 20, 2018, Respondent unlawfully modified Article 5.1 of the service and maintenance employees' bargaining unit contract without the Union's consent (specifically by providing higher wage rates to newly hired CNAs without providing that same higher wage rate to current CNAs with the same or more experience), and thereby violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

C. Did Respondent Violate the Act with its Conduct Regarding Finding Bargaining Unit Employees to Cover Open Shifts and/or Call-Outs, and Regarding Paying Bargaining Unit Employees for Performing that Work?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, since about January 26, 2018, promising to pay employees time and one half or double time to cover open shifts and/or call-outs, in order to influence employees to reject the Union as their bargaining representative. (GC Exh. 50 (pars. 7, 31).)

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about January 26, 2018: unilaterally changing the manner in which it offered bargaining unit employees the opportunity to work open shifts and/or call-outs; unilaterally changing the manner in which it paid bargaining unit employees for working open shifts and/or call-outs, by paying employees who did so time and one half or double time; and bypassing the Union and dealing directly with bargaining unit employees by paying employees time and one half or double time for working open shifts and/or call-outs. (GC Exh. 50 (pars. 23–26, 34).)

Last, the General Counsel alleges that Respondent, within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) of the Act, unlawfully and without the Union's consent: changed the manner in which it offered bargaining unit employees the opportunity to work open shifts and/or call-outs; and changed the manner in which it paid bargaining unit employees for working open shifts and/or call-outs, by paying employees who did so time and one half or double time. (GC Exh. 50 (pars. 23–25, 33).)

2. Summary of facts

Since 2017, Respondent has covered open shifts (i.e., shifts to which no employee was assigned) by periodically posting a list of open shifts and permitting employees to sign up to cover the shifts on a voluntary basis. If two or more employees signed up for the same shift, then Respondent awarded the shift to the employee with the most seniority, excluding any employees that would incur overtime if they worked the shift. Respondent has consistently followed that practice for covering open shifts, except as noted below. (FOF, Section II(C)(3).)

For open shifts that resulted from employee call-outs, as well as last-minute open shifts (i.e., open shifts that remained unfilled after being posted), Respondent's practices in 2017 were muddled. Specifically, when contacting employees about filling those shifts, Respondent sometimes contacted employees in order of seniority, but other times simply called employees in no particular order. (FOF, Section II(C)(3).)

In a side letter to each of the collective-bargaining agreements, Respondent and the Union agreed that Respondent could pay a bonus to CNAs and nurses who covered open shifts. Respondent and the Union also agreed that Respondent would stop paying those bonuses on January 7, 2017, and thereafter meet and discuss, as needed, any issues of mutual concern related to staffing. (FOF, Section II(C)(4).)

Notwithstanding the side letters, in April 2017, Respondent began sporadically offering and paying bonuses to entice employees to cover last-minute open shifts and call-outs. By January 1, 2018, Respondent regularly was offering a time and a half bonus as an incentive for working these shifts (or a paid day off for nurses, which is the equivalent of a double time bonus), and by April 21, 2018, Respondent regularly was offering as much as double time as an incentive for employees in both bargaining units. At all times in 2018, Respondent did not follow seniority when offering bonuses to employees to cover call-outs or last-minute open shifts. Respondent also did not notify or bargain with the Union about these bonuses – instead, Respondent contacted individual employees directly and negotiated about whether the employee would cover the last-minute shift/call-out and what type of bonus Respondent might offer. There is no credible evidence that Respondent offered or paid these incentive bonuses to union delegates. (FOF, Section II(C)(4), (F)(1), (I).)

3. Applicable legal standard

The General Counsel has alleged that Respondent, through its practices related to offering employees the opportunity to work open shifts and/or call-outs and its practice of paying bonuses to employees who worked those shifts, violated the Act by modifying provisions in the collective-bargaining agreement, or alternatively by unilaterally changing its policies and practices.

I find that the complaint allegations here concerning how Respondent offered employees the opportunity to work open shifts and/or call-outs and how Respondent compensated employees for working those shifts must be analyzed under the unilateral change theory. The collective-bargaining agreements do not contain any provisions that address how Respondent may offer opportunities to work open shifts and/or call-outs. Further, the collective-bargaining agreements do not contain any provisions that establish what bonuses Respondent may pay to employees for working open shifts or shifts left open by call-outs. Accordingly, I find that the General Counsel's contract modification theories concerning these issues must be dismissed. See *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 6–7 (explaining that the unilateral change and contract modifications are mutually exclusive, such that the judge should analyze alleged misconduct under only one of the theories).

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of

employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.[67] The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue, and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3–4 (2016).

If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change: did not alter the status quo (e.g., because the change in question was part of a regular and consistent past pattern); did not involve a mandatory subject of bargaining; was not material, substantial and significant; or did not vary in kind or degree from what has been customary in the past. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20. In addition, the employer may assert that the contractual language privileged it to make the disputed change without further bargaining (the "contract coverage" defense). Under the contract coverage defense, the Board will determine whether the parties' collective-bargaining agreement covers the disputed unilateral change. In making that determination, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation, and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. Since a collective-bargaining agreement establishes principles that govern a myriad of fact patterns, the Board will not require (as a prerequisite to the defense) that the agreement specifically mention, refer to or address the employer decision at issue. If the contract coverage defense is not met, then the Board will determine whether the union waived its right to bargain about a challenged unilateral change. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11–12.

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

4. Analysis

[67] Separate and apart from the unilateral change doctrine, an employer also has a "duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain," unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11–12, 16–17, 20 (emphasis in original).

Based on the facts established in the evidentiary record, I find that two of the General Counsel's allegations concerning open shifts and call-outs fall short and must be dismissed. First, I do not find that Respondent violated Section 8(a)(1) of the Act by promising to pay employees bonuses to cover open shifts and/or call-outs for the purpose of influencing employees to reject the Union as their bargaining representative. The General Counsel argues that Respondent offered the bonuses to encourage employees to sign the decertification petition that circulated in June 2018, but the evidentiary record shows that Respondent began offering and paying bonuses consistently by January 2018 (if not before). Since Respondent began offering and paying bonuses for covering shifts well before Birch began circulating the decertification petition (and well before she even contemplated the idea), I cannot find that Respondent took that action for the purpose of influencing employees to sign the petition and reject the Union.

Second, I do not find that Respondent unilaterally changed the manner in which it offered bargaining unit employees the opportunity to work open shifts and/or call-outs. For open shifts that Respondent knew about in advance, Respondent followed an established practice of posting those shifts and awarding the shift to the most senior employee who signed up for the shift (provided that the employee would not have to be paid overtime if they worked the shift). The evidentiary record does not show that Respondent changed that practice. As for call-outs and last-minute open shifts, the evidentiary record does not show that Respondent had an established practice for filling those shifts. Sometimes Respondent contacted employees in order of seniority, but other times Respondent contacted employees in any order that seemed appropriate for the circumstances (e.g., by first contacting employees who were already at the facility working a shift, or by first contacting employees who had track records of picking up open shifts). Time was of the essence in finding employees to work these shifts because Respondent had an obligation to maintain appropriate staffing at the facility. It is therefore understandable that Respondent would focus on quickly finding an employee willing to work the shift, and not so much on where that employee stood on the seniority list. Accordingly, since the evidence shows that Respondent did not have a consistent practice for offering employees the opportunity to cover last-minute open shifts and call-outs, the General Counsel misses the mark with its argument that Respondent unilaterally changed its practices on that issue.

I do find, however, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally deciding to pay time and one half and double time bonuses to bargaining unit employees who covered last-minute open shifts and call-outs, and by bypassing the Union and dealing directly with employees about those bonuses. It is well established that bonuses are a mandatory subject of bargaining where, as here, they are tied to remuneration that employees receive for their work and are thus properly characterized as wages. See *Lewanee Stamping Corp. d/b/a Kirchhoff Van-Rob*, 365 NLRB No. 97, slip op. at 1 fn. 2, 8 (2017); *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). The evidentiary record shows that by January 1, 2018, Respondent had adopted a regular practice of paying a time and one half bonus to employees who covered last-minute open shifts and call-outs, and further shows that Respondent increased that bonus to double time by April 21, 2018. Respondent did not notify or bargain with the Union before implementing the bonuses.[68]

[68] Respondent argues that union delegates were aware that Respondent was offering and paying bonuses (and that some delegates received the bonuses themselves), and further argues that the Union

Instead, Respondent bypassed the Union and offered and paid the bonuses directly to individual employees. By offering and paying the bonuses in that manner, Respondent violated the Act.

To the extent that Respondent might rely on the contract coverage defense, that defense fails here. In side letters to each of the collective-bargaining agreements, Respondent and the Union agreed that, effective January 7, 2017, Respondent would stop paying bonuses to employees for covering open shifts (which would include covering last-minute open shifts and call-outs) and thereafter meet and discuss any staffing issues with the Union. That explicit language trumps the broad language in the management-rights clauses about matters left to Respondent's discretion, and also demonstrates that the Union did not waive its right to bargain over Respondent's subsequent decision to offer and pay bonuses to employees who covered last-minute open shifts and call-outs.

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act by, since January 26, 2018:[69] unilaterally offering and paying employees time and one half or double time for working last-minute open shifts and/or call-outs; and bypassing the Union and dealing directly with bargaining unit employees concerning time and one half or double time bonuses for working last-minute open shifts and/or call-outs.

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waived its right to bargain about the bonuses by not exercising due diligence and requesting bargaining in a timely manner. (R. Posttrial Br. at 39–41.) The Board has recognized a waiver defense where a Union has notice of a unilateral change and fails to exercise due diligence by requesting bargaining in a timely manner. See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171–172 & fn. 11 (2017) (noting that in cases where the Board has found a lack of due diligence, those cases typically involve situations in which, despite having advance notice of a change in practices and an adequate opportunity to request bargaining before implementation, the Union does not request bargaining or waits until after implementation to request bargaining), enfd. in pertinent part, 701 F.3d 710 (D.C. Cir. 2012); see also *Kansas Education Assn.*, 275 NLRB 638, 639 (waiver of right to bargain found where the union had notice of a proposed change but did not request bargaining until nearly a month after the employer implemented the change); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (waiver of right to bargain found where the union never requested bargaining over proposed changes), enfd. 586 F.2d 835 (3d Cir. 1978).

Respondent cannot rely on the failure to exercise due diligence waiver defense here because the defense is not supported by the evidentiary record. The evidentiary record shows that Belezarian came up with the idea of offering bonuses without any input from the Union or union delegates, and offered and paid the bonuses in a way that limited employee chatter and avoided creating a paper trail. When union delegates got wind of the bonuses in or about early May 2018 (through the note inquiring about Birch's bonus), Belezarian flatly denied paying any bonuses even though Respondent had an established the practice of doing so since January 1, 2018. Moreover, Respondent never notified Teoli about the bonuses, even though Teoli (and not the union delegates) was the Union's representative for collective-bargaining. (See FOF, Section II(C)(3), (F)(1), (I), (J)(2)–(3).) Based on those facts, Respondent cannot show that the Union had notice of the bonuses and failed to assert its bargaining rights, and further cannot show that it would have been productive for the Union to attempt to bargain over the bonuses, which were a fait accompli when the Union learned about the practice in early May 2018. Accordingly, Respondent's waiver defense fails.

[69] Although Respondent began this practice by January 1, 2018, the complaint specifies January 26, 2018, as the date that the violations began. I have held the General Counsel to the January 26, 2018 date.

D. Did Respondent Violate the Act by Making Improper Remarks to Employees about Wages and Pay Raises?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, in about late May 2018: telling per diem employees that if they took a regular position with Respondent, they would keep the higher wage Respondent provided to per diem employees; instructing employees to ignore what Union delegates said about wage rates; and instructing employees that they should not be discussing wage rates. (GC Exh. 50 (pars. 8(a)–(c), 31).)

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by, in about mid to late June 2018, promising employees that they would receive pay raises once the Union was removed as their bargaining representative. (GC Exh. 50 (pars. 9, 31).)

2. Summary of facts

In late May or early June 2018, in connection with ongoing discussion in the workplace about increasing wages (particularly for CNAs), Belezarian and Sousa assured employees that management was working on the issue. Belezarian added that if employees got rid of the Union, that would free her hands to increase CNA wages instead of having all of the money go to union delegates. Belezarian made similar remarks to employees on or about June 21, 2018, when she called small groups of CNAs into her office and stated that she wanted to pay all CNAs the same base rate, but could only accomplish that goal through negotiations with the Union, employees signing a petition to vote the Union out, or employees resigning and working at the facility as employees of an outside staffing agency. (FOF, Section II(K)(1), (N).)

In mid-June 2018, when rumors were circulating about wage rates (including a rumor that the Union wanted to lower wage rates to the rates specified in the collective-bargaining agreements), managers told various employees that they should not discuss their wage rates with other employees. In addition, when CNA Nicole Talbot spoke to Belezarian after being told (by Sullivan) that Talbot's $14.00 per hour wage rate would be cut because it was not approved by the Union, Belezarian assured Talbot that her wages would stay at $14.00 per hour, and advised Talbot to ignore what Sullivan and other union delegates were saying about wage rates. (FOF, Section II(M)(1).)

The General Counsel did not meet its burden of proving that, on June 26, 2018, Belezarian encouraged Sharon Lukusa to sign the decertification petition by telling Lukusa she would receive a raise if the Union was out of the facility. (FOF, Section II(O)(4).)

3. Applicable legal standard

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected

activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860 (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

Section 8(c) of the Act protects the expression of any views, argument, or opinion, if such expression contains no threat of reprisal or force or promise of benefit. Accordingly, an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 7; *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006).

4. Analysis

As noted above, when Talbot spoke to Belezarian to ask if her $14.00 per hour wage would be cut, Belezarian assured Talbot that she could keep her higher wage, and told Talbot that ignore what Sullivan and other union delegates were saying about wage rates. I find that both of those statements were permissible under Section 8(c) of the Act. The collective-bargaining agreement permitted Respondent to hire Talbot at the $14.00 per hour rate.[70] Given that Sullivan had erroneously asserted that Talbot's wages would have to be cut because the Union did not approve the higher wage, it was reasonable within that specific context for Respondent to assure Talbot that she could keep her $14.00 wage, and to tell Talbot to ignore what Sullivan and other union delegates were saying about wage rates. Since neither of Belezarian's statements to Talbot had a reasonable tendency to interfere with, restrain or coerce union or protected activities, I recommend that the allegations in paragraphs 8(a) and 8(b) of the complaint be dismissed.[71]

Respondent's broader statements to employees that they should not discuss their wage rates with other employees, by contrast, were unlawful. Although Respondent may have made those remarks in an effort to keep a lid on the increasing tension about wage rates, Respondent went too far with its general instruction to not discuss wage rates. "The Board has long held that it is unlawful for employers to prohibit employees from discussing wages among themselves." *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014); see also *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017) (noting that a work rule prohibiting employees from discussing wages or benefits with one another would be designated as unlawful). Since Respondent ran afoul of that principle with its mid-June 2018 instruction that employees should not discuss wage rates, I find that Respondent violated Section 8(a)(1) of the Act.

[70] To be sure, the decision to hire Talbot at the $14.00 per hour rate triggered an obligation under the collective-bargaining agreement to increase the wages of any current CNAs with similar or more experience, but the fact remained that Talbot could stay at the $14.00 per hour rate.

[71] Technically, the General Counsel should have amended the allegation in paragraph 8(a) of the complaint. As written, that portion of the complaint asserts that Respondent violated Section 8(a)(1) by telling per diem employees that if they took a regular position with Respondent, they would keep the higher wage Respondent provided to per diem employees. I did not find that Respondent made such a statement, but rather found that Belezarian told Talbot she could keep her higher wage even though it was not approved by the Union. In any event, I have addressed the lawfulness of Belezarian's actual statement to Talbot because the parties fully litigated the content of Talbot's conversation with Belezarian.

Last, I also find that Respondent violated the Section 8(a)(1) of the Act when Belezarian told employees: in late May or early June 2018, that if employees got rid of the Union that would free her hands to increase CNA wages instead of having all of the money go to union delegates; and on or about June 21, 2018, that she wanted to pay CNAs the same base rate but could not accomplish that unless Respondent negotiated with the Union, employees signed a petition and voted the Union out, or employees resigned and worked at the facility as employees of an outside agency. In making the "free her hands to increase CNA wages" remark, Belezarian crossed the line between permissible expression of opinion and unlawful conduct because she promised employees a benefit (higher wages) if they got rid of the Union. Belezarian made a similar unlawful promise with her June 21 remark, insofar as she promised to provide CNAs a base wage rate but suggested that the Union was standing in the way of that goal. These types of remarks and promises are not protected by Section 8(c), and violate Section 8(a)(1) of the Act. See *Mickey's Linen & Towel Supply*, 349 NLRB 790, 790 fn. 2, 794 (2007) (finding that the employer violated Section 8(a)(1) by asking employees why they needed a union and asserting that the employer could give them good benefits); *Fabric Warehouse*, 294 NLRB 189, 191 (1989) (finding that the employer violated Section 8(a)(1) by promising employees that they would receive better benefits if they got rid of the union), enfd. 902 F.2d 28 (4th Cir. 1990); see also *Medo Photo Supply v. NLRB*, 321 US 678, 685–686 (1944) (explaining that the employer violated Section 8(a)(1) of the Act by using a wage increase to induce employees to leave the union).

E. Did Respondent Violate the Act by Failing and Refusing to Provide Information in Response to the Union's Information Requests?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about June 12, 2018, failing and refusing to provide the Union with information in response to the Union's verbal request for the starting wages of all bargaining unit employees and documentation of any subsequent wage increases. (GC Exh. 50 (pars. 27(a), 27(c), 34).)

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about June 20, 2018, failing and refusing to provide the Union with information in response to the Union's written requests (dated June 20, 25, 28 and 29, 2018) for the hourly wage rates of all bargaining unit employees. (GC Exh. 50 (pars. 27(b), 27(c), 34).)

2. Summary of facts

On June 12, 2018, the Union verbally requested that Respondent provide a list of all bargaining unit members and their hourly wage rates. There is no evidence that Respondent provided the information that the Union requested on June 12, 2018 (beyond a list of CNAs and their hourly wage rates that Respondent provided on June 12, 2018). (FOF, Section II(L).)

On June 20, 2018, the Union requested via email that Respondent provide the hourly wage rates for all bargaining unit members. The Union renewed that request via email on June

25, 28 and 29, 2018. There is no evidence that Respondent provided the information that the Union requested on June 20, 25, 28 and 29, 2018. (FOF, Section II(M)(1), (P)(1).)

3. Applicable legal standard

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra unit employees is not presumptively relevant, and thus relevance must be shown. The burden to show relevance, however, is not exceptionally heavy, as the Board uses a broad, discovery type standard in determining relevance in information requests. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

4. Analysis

The evidentiary record establishes (and the parties do not dispute) that the Union made both verbal (on June 12) and written (on June 20, 25, 28 and 29) requests for the hourly wage rates for all employees in the bargaining unit, and that Respondent did not provide that information beyond a partial disclosure of CNA wage rates on June 12. Since the Union's information requests related to the wages of bargaining unit employees, I find that the Union requested information that is presumptively relevant to its role as exclusive collective-bargaining representative.

Respondent asserts that it did not violate the Act because any obligation that it had to provide the information ended on July 6, 2018, when Respondent withdrew recognition of the Union. (See R. Posttrial Br. at 52–53.) The Board indeed has held that an employer that lawfully withdraws recognition of a union no longer has a duty to provide the union with requested information. See *Champion Home Builders Co.*, 350 NLRB 788, 792–793 (2007); *Renal Care of Buffalo*, 347 NLRB 1284, 1286 (2006). It suffices to say that this line of cases does not apply here because Respondent's July 6, 2018 withdrawal of recognition of the Union was unlawful. (See Discussion and Analysis Section J, infra.)

In the absence of any other applicable defense, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information in response to the Union's June 12 and 20, 2018 information requests.

F. Did Respondent Violate the Act by Bypassing the Union and Dealing Directly with Employees about Resigning and Working for Respondent as an Agency Employee, and about Signing a Document in Support of Removing the Union?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, in about late June or early July 2018, bypassing the Union and dealing directly with its employees in both bargaining units by soliciting them to resign from Respondent and from the Union, by encouraging them to sign a document in support of removing the Union from the

facility, and by encouraging them to enter into individual employment contracts with an agency which would be affiliated with Respondent. (GC Exh. 50 (pars. 30, 34).)

2. Summary of facts

On or about June 21, at a time when various CNAs were concerned about wages, Belezarian called small groups of CNAs to her office for meetings. In those meetings, Belezarian stated that she wanted to pay all CNAs the same base rate, but indicated that there were three options to accomplish that goal: wait and negotiate with the Union; sign a petition and vote the Union out; or have a majority of the CNAs resign but continue to work at the facility as employees of an outside staffing agency that would provide the same wage rates and benefits. The CNAs opted to resign and work for an outside agency, and accordingly hand wrote and signed resignation letters to that effect and gave the letters to Belezarian. The next day, Belezarian decided that the resignation letters were a bad idea and accordingly the resignation letters were destroyed. (FOF, Section II(N).)

3. Applicable legal standard

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB at 1144.

4. Analysis

At the outset, I note that it is undisputed that Belezarian met with CNAs in her office on June 21, 2018, and that the Union was not included in those meetings. The parties differ, however, about the purpose of the meetings, with the General Counsel and the Union maintaining that Respondent was unlawfully encouraging the CNAs to get rid of the Union either by signing a decertification petition or resigning from the Union to work for a private agency, and with Respondent maintaining that it merely was answering employee questions about options for removing the Union.

The Board has indicated that an employer may lawfully provide information to an employee about circulating a decertification petition, particularly if the employee is the one who raises the issue and the employer's assistance is free from any threat of reprisal or promise of benefit. See, e.g., *Sears, Roebuck & Co.*, 368 NLRB No. 30, slip op. at 1 fn. 1 (2019) (finding that the employer did not unlawfully assist with a decertification petition because the employer reasonably interpreted the employee's inquiry as requesting information about the decertification process); *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 941–942 (2001) (same); *Peoples Gas System*, 275 NLRB 505, 507–508 (1985) (same, where employer informed employees of their right to resign from the union in an atmosphere that was free from any threat of reprisal or promise of benefit). Respondent maintains that Belezarian's June 21 conversation with the group of CNAs was similarly lawful because the CNAs requested information about options for

getting rid of the Union and securing their wages, and Belezarian merely provided the information that the CNAs requested. (See R. Posttrial Br. at 35–37.)

Respondent's defense is not supported by the evidentiary record. To the contrary, the evidentiary record shows that Belezarian called the CNAs to the June 21 meetings, at which she (and not the CNAs) raised the issue of wanting to pay all CNAs the same base rate. Belezarian took the additional step of presenting options for CNAs to secure their wages, including signing a decertification petition to remove the Union or resigning and working for an outside agency that would provide the same wages and benefits. By presenting those options as the means to obtain the benefit of secure wages, and by having employees actually execute resignation letters so they could work for an outside agency as Belezarian suggested, Belezarian improperly (and without the Union's involvement) engaged the CNAs in a discussion aimed at changing the terms and conditions of their employment and undermining the Union's role in bargaining.

In sum, I find that the General Counsel demonstrated that Respondent violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing with CNAs in the bargaining unit on June 21, 2018, specifically by proposing, as a means to secure their wages and benefits, that the CNAs sign a decertification petition or resign their employment with Respondent and begin working at the facility as employees of an outside agency that would provide the same wages and benefits.

G. Did Respondent Violate the Act by Posting its June 29, 2018 Memorandum about the Wage Rate Dispute?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, on or about June 29, 2018, telling employees (via memorandum) that the Union demanded that Respondent reduce the wage rates of new hires and rescind recently implemented wage increases for existing employees. (GC Exh. 50 (pars. 12, 31).)

2. Summary of facts

On June 12, 2018, Respondent and the Union participated in a meeting to discuss, among other topics, CNA wage rates. When the Union's negotiator (Teoli) learned for the first time that Respondent already had been hiring new CNAs above the starting rate specified in the collective-bargaining agreement, she objected to the changes, threatened to file Board charges, and threw in a few choice words for good measure. The evidentiary record does not establish, however, exactly what Teoli stated Respondent should do to address the issue, apart from providing the Union with information about employee wage rates. (FOF, Section II(L) (noting that I could not determine with sufficient reliability whether the Union, through Teoli, asserted that Respondent should rescind the wage increases that it gave to CNAs before June 12).)

In the weeks that followed, the Union and Respondent debated but did not resolve what steps, if any, Respondent should take to address the wage rate dispute. On or about June 22, the Union also circulated a memorandum asserting that it was attempting to secure higher wages for all employees, and also asserting that Respondent was "making shady side deals, playing

favorites, hiring people at different, secret rates, refusing to negotiate higher rates for all employees, and hiding the facts[.]" (FOF, Section II(M)(3)–(5) (emphasis omitted).)

On June 29, 2018, Respondent posted a memorandum with its perspective on the ongoing discussions and dispute about employee wages. The memorandum stated, in pertinent part:

> Most recently, we hired [CNAs] above our required hiring wage, and subsequent to that we also increased the rates of existing employees who were below that wage. We notified the Union of this change, and we were shocked and dismayed with their angry reaction and their demand that we reverse the new employees and the employees who we increased wages back down to the lower rate of pay, because the Union could not take credit for this increase. We emphatically refused to do so as it would be the wrong thing to do. Now the Union, in an effort to take credit, has reversed their position from lowering these wages, and has now taken on a campaign of unwarranted attacks and spreading blatant false information. This increase was not about taking credit. It was about doing the right and responsible thing for the good of all at Country Gardens.

(FOF, Section II(P)(4) (emphasis omitted).)

3. Applicable legal standard

As previously noted, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860. Section 8(c) of the Act protects the expression of any views, argument, or opinion, if such expression contains no threat of reprisal or force or promise of benefit. Accordingly, an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 7; *Children's Center for Behavioral Development*, 347 NLRB at 35.

4. Analysis

Based on the evidentiary record, I recommend that the complaint allegation about Respondent's June 29, 2018 memorandum be dismissed. The General Counsel maintains that in the memorandum, Respondent falsely asserted that the Union demanded that Respondent reverse the higher wages that were being paid to new CNAs and certain current CNAs. (See GC Br. at 89–90.) Since the General Counsel did not prove that Respondent's memorandum was false, however, Respondent's assertion is protected by Section 8(c) of the Act as a permissible expression of argument or opinion.

H. Did Respondent Violate the Act by Soliciting Employees to Decertify the Union and/or by Providing More Than Ministerial Assistance to Employees with Removing the Union?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, between about June 2018 to about July 6, 2018: soliciting employees to decertify the Union by promoting and encouraging them to collect employee signatures to support removing the Union; and providing more than ministerial assistance to employees in helping them remove the Union. (GC Exh. 50 (pars. 11, 31).)

2. Summary of facts

In early June 2018, Birch began researching how to circulate a decertification petition to remove the Union. By mid-June 2018, Belezarian was aware that Birch planned to circulate a decertification petition but was not certain of exactly when Birch would do so. When Belezarian met with groups of CNAs on about June 21 to discuss her goal of paying CNAs the same base rate, Belezarian mentioned that employees could wait for contract negotiations with the Union, sign a petition to get the Union out, or resign but continue working at the facility as employees of an outside agency that would provide the same wages and benefits. (FOF, Section II(M)(1)–(3), (N).)

Birch circulated the decertification petition from June 22–26, 2018. Although Birch obtained some petition signatures when she and her coworkers were off duty, Birch obtained a number of signatures while she and/or her coworkers were at the facility and on work time. Birch also left her assigned work area to deliver the petition to an employee who could circulate it on the West wing of the facility. Respondent was aware that Birch was circulating the petition on work time, because when Kelly Sherman told Belezarian, Minyo and Perry that she had just signed the petition, Minyo responded "Shhh. We're not supposed to talk about that." (FOF, Section II(O)(1)–(2), (4); see also FOF, Section II(V)(5) (noting that Respondent permitted employees to engage in nonwork activities like raffles and sales while on work time, and permitted employees to leave their work areas to engage in nonwork activities, provided that employees were not abandoning residents to do so).)

Birch finished collecting signatures on the decertification petition by June 26 and sent the petition to the NLRB for filing that same evening. Birch handled all communications with the NLRB about the petition. Respondent, however, did ask Birch to provide a copy of the petition signatures so Respondent could verify the signatures and then evaluate what next steps might be appropriate (including withdrawal of recognition).[72] (FOF, Section II(O)(4), (Q).)

3. Applicable legal standard

An employer violates Section 8(a)(1) of the Act by soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative. In determining whether an employer's assistance is unlawful, the appropriate inquiry is whether the employer's conduct constitutes more than

[72] The General Counsel asserts that Belezarian encouraged Sharon Lukusa to sign the decertification petition, but I did not find that Belezarian made those remarks. (See GC Br. at 90; FOF, Section II(O)(4).) I also did not find that Respondent made any improper or unlawful remarks in its June 29 memorandum to employees. (See Discussion and Analysis, Section G, supra; GC Br. at 90 (asserting that the June 29 memorandum also was a form of unlawful assistance to the decertification petition).)

ministerial aid. In making that inquiry, the Board considers the circumstances to determine whether the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned. *Leggett and Platt, Inc.*, 367 NLRB No. 51, slip op. at 1 fn. 4, 16 (2018); *Mickey's Linen & Towel Supply*, 349 NLRB at 791.

4. Analysis

The Board has explained that in the context of an effort by employees to decertify their union, there are two types of conduct that may improperly affect, or taint, the decertification petition. First, a taint may occur "when an employer has engaged in unfair labor practices directly related to [the] employee decertification effort, such as 'actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *SFO Good-Nite Inn, LLC*, 357 NLRB 79, 79–80 (2011) (citing *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.3d 1088 (5th Cir. 1988)), enfd. 700 F.3d 1 (D.C. Cir. 2012). Second, a taint may occur where there is a "causal link between decertification efforts and *other* unfair labor practices distinct from any unlawful assistance by the employer in the actual decertification petition." *SFO Good-Nite Inn, LLC*, 357 NLRB at 79–80 (citing *Master Slack Corp.*, 271 NLRB 78, 78 fn. 1, 84 (1984)).

To evaluate the General Counsel's allegation that Respondent unlawfully assisted with the June 2018 decertification effort at issue in this case, I find that our focus must be on conduct that is directly related to the decertification effort (i.e., conduct in the first category described above). Thus, I do not rely on the following conduct that the General Counsel characterizes as unlawful assistance: Belezarian's late May/early June 2018 statement that if employees got rid of the Union that would free Respondent's hands to pay employees higher wages. (See FOF, Section II(K)(1); GC Posttrial Br. at 90 (citing this conduct as evidence of unlawful assistance).)[73] Belezarian made her statement well before Birch began circulating her decertification petition, and thus the statement was not directly related to the decertification effort.[74]

I do not find that Respondent provided unlawful assistance to the decertification effort. Although Belezarian and other managers knew that Birch planned to and did circulate a decertification petition, that knowledge alone does not amount to unlawful assistance. Respondent's awareness that Birch was circulating the petition on work time also falls short of unlawful assistance, particularly given Respondent's established practice of permitting employees to engage in a variety of nonwork activities (e.g., raffles, sales, social conversations) on work time as long as the employees were not abandoning residents to do so. See *Mickey's Linen & Towel Supply*, 349 NLRB at 795 (finding that the employer did not provide unlawful assistance to a decertification petition that was circulated on work time and in other work areas,

[73] In the same late May/early June timeframe, Sousa and Belezarian told employees that they were working on the CNA wages issue. (FOF, Section II(K)(1).) I did not find that Sousa and Belezarian said (or meant) that they were working on ways to get rid of the Union, and thus reject the General Counsel's argument that this conduct was another example of unlawful assistance to the decertification effort. (See GC Posttrial Br. at 90.)

[74] Belezarian's statement is relevant, however, to the question of whether the decertification petition was tainted by prior unfair labor practices. I will address that question when I evaluate whether Respondent lawfully withdrew recognition of the Union on July 6, 2018.

in part because the employer also permitted employees to solicit and sell products on work time and in other work areas as long as productivity was not impacted); *Ernst Home Centers*, 308 NLRB 848, 848 (1992) (employer did not provide unlawful assistance to a decertification petition where the employee decided on her own to file the petition, and the employer merely provided language for the petition). And, since Birch handled filing the petition on her own, it was not improper for Respondent to ask Birch for a copy of the petition signatures to verify their authenticity and determine what steps might be appropriate. See *Lee Lumber & Building Material*, 306 NLRB 408, 410 & fn. 13 (1992) (finding that the employer provided unlawful assistance with filing a decertification petition, but basing that finding on the employer facilitated the filing by providing paid time off, parking expenses and transportation).

Belezarian's comments to employees in the June 21 meetings raise the closest question, but still fall short of constituting unlawful assistance to the decertification effort. While Belezarian did suggest that employees could sign a decertification petition to remove the Union, she made that suggestion before Birch actually began circulating the petition. The June 21 meeting was not, therefore, similar to a meeting where an employer encourages employees to sign a decertification petition that is already in circulation. In addition, the main focus of the June 21 meetings was to (unlawfully) encourage certain CNAs to prepare and sign letters resigning their employment with Respondent so they could work for an outside agency that would provide the same wages and benefits. In light of that focus, the June 21 meetings were not principally related to the decertification effort that Birch started on June 22, but rather were related to the broader goal of undermining the Union. The June 21 meeting is therefore relevant to whether the petition was tainted by prior unfair labor practices (under *Master Slack*), but does not establish unlawful assistance here.

For the foregoing reasons, I recommend that the allegation that Respondent unlawfully assisted with the June 2018 decertification petition be dismissed.

I. Did Respondent Violate the Act by Engaging in Unlawful Surveillance of Employees in or about Early July 2018?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, in about early July 2018, including July 2 and July 6, engaging in surveillance of employees engaged in union activity, and engaged in surveillance of employees in order to prevent them from engaging in union and other activity. (GC Exh. 50 (pars. 13, 31).)

2. Summary of facts

In late June, and in response to the heightened tensions at the facility due to (among other things) the CNA wage dispute and the decertification petition, Respondent took various steps to deter employees from congregating to talk and become distracted from their job duties. Specifically, managers increased their presence at the facility, spent more time in resident care areas, and on at least one occasion directed a union delegate to return to her assigned unit (without regard to whether the delegate was off her unit for a work-related reason). In addition, in early July 2018, Respondent installed fake cameras in resident care areas, with the cameras

positioned in ways that made it appear that Respondent was recording activities in the hallways and at the entrances to kitchenettes where employees often took breaks. (FOF, Section II(U)(1).)

On July 2, Teoli came to the facility to meet with employees in a parking lot at the rear of the property. When Teoli arrived, Respondent (through Belezarian) asserted that Teoli could not be on the property, but ultimately relented. Belezarian and Minyo, however, remained outside the building within 10–50 feet of Teoli as she met with bargaining unit members for approximately 40 minutes. It was unusual for Respondent's managers to observe Teoli's communications with employees in this manner. (FOF, Section II(P)(6); see also FOF, Section II(P)(2)–(3) (indicating that on both June 26 and 28, 2018, Teoli met with bargaining unit members at the facility without managers observing nearby).

On July 4, Belezarian texted Gomes about a union flyer that was posted. Belezarian stated that she saw the flyer and advised Gomes could post the flyer on the union bulletin board. Belezarian added, however, that no one could distribute any literature or post on any public boards. (FOF, Section II(R).)

On July 6, Teoli returned to the facility to meet with employees, but on this occasion set up a table in the grass in front of the facility. Belezarian confronted Teoli, asserting that Teoli could not be at the facility. When Teoli indicated that she was going to stay at the facility, Belezarian called the police and stayed nearby with other managers while Teoli spoke with bargaining unit members. (FOF, Section II(S).)

On or about July 9, Veno told a group of employees that they could wear union buttons in the facility as long the buttons did not interfere with resident care. Veno added, however, that the employees could not engage in any other union business in the building. (FOF, Section II(U)(1).)

3. Applicable legal standard

A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008).

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. The standard is an objective one, based on the rationale that employees should be free to participate in union activities without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Metro One Loss Prevention Services*, 356 NLRB 89, 102 (2010).

4. Analysis

I find that Respondent engaged in unlawful surveillance when Belezarian and other managers stood outside the facility on July 2 and 6, 2018, and observed from a distance of 10–50 feet while Teoli was meeting with bargaining unit employees. The managers' behavior was out of the ordinary and cannot be characterized as merely observing union activities conducted in a public setting. Instead, Respondent's conduct had a reasonable tendency to chill employees from exercising their Section 7 rights because: (a) a reasonable employee seeing managers hovering feet away from Teoli for an extended period of time would think twice about walking outside to meet with Teoli; and (b) only one week before, Respondent permitted Teoli to meet with employees at the facility without incident or interference. See *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342–1343 (2005) (finding that the employer engaged in unlawful surveillance by, among other things, intentionally remaining in close proximity to union representatives who were distributing union literature to employees).[75]

I also find that Respondent unlawfully created the impression of surveillance, but only on: July 4, 2018, when Belezarian told Gomes that she saw a union flyer and asserted that the flyer could be posted on the union bulletin board but no one could distribute literature; and July 9, 2018, when Veno told employees that they could wear union buttons but could not engage in any other union activity at the facility.[76] Those remarks let the employees know that Respondent was on the lookout for union activity, and effectively warned employees against engaging in those activities. I do not, by contrast, find that Respondent violated the Act by installing fake cameras and increasing managerial presence at the facility in late June/early July 2018. Those measures affected all employees equally, and a reasonable employee familiar with the heightened tensions at the facility in that timeframe would understand that Respondent was attempting to quell employee tensions irrespective of whether the affected employees supported the Union.

In sum, I find that Respondent violated Section 8(a)(1) of the Act by: on or about July 2 and 6, 2018, engaging in surveillance of employees involved in union activities; and on or about July 4 and 9, 2018, unlawfully creating the impression of surveillance of union activities.

[75] I have considered the line of cases in which the Board has held that an employer's mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance. See, e.g., *Key Food Stores*, 286 NLRB 1056, 1056 (1987); see also R. Posttrial Br. at 54–55 (citing *Key Food Stores* and similar cases). Those cases are distinguishable because Respondent's conduct here was out of the ordinary – before July 2 and 6, Respondent did not watch while Teoli met with bargaining unit members, let alone watch from locations close enough to see which employees chose to speak to Teoli. By changing its conduct towards union-employee discussions on July 2 and 6, Respondent engaged in unlawful surveillance as alleged in the complaint.

[76] The General Counsel somewhat inartfully pled the "creating an impression of surveillance" theory as surveillance aimed at preventing employees from engaging in union activity. I find, however, that the complaint and the evidence presented at trial placed Respondent on sufficient notice of the "creating an impression of surveillance" theory.

J. Did Respondent Violate the Act when it Withdrew Recognition of the Union on July 6, 2018?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on about July 6, 2018, withdrawing recognition of the Union as the exclusive collective-bargaining representative of both the service and maintenance employees' unit the registered nurses' unit. (GC Exh. 50 (pars. 29, 34).)

2. Summary of facts

Between January 26 and June 22, 2018, Respondent committed the following unfair labor practices that were not remedied:

(a) since January 26, 2018, unilaterally offering and paying employees time and one half or double time for working last-minute open shifts and/or call-outs; and bypassing the Union and dealing directly with bargaining unit employees concerning time and one half or double time bonuses for working last-minute open shifts and/or call-outs (violation of Section 8(a)(5) and (1) of the Act, see Discussion and Analysis Section C);

(b) on February 20, 2018, unlawfully modifying Article 5.1 of the service and maintenance employees' collective-bargaining agreement without the Union's consent, specifically by providing higher wage rates to newly hired CNAs without providing that same higher wage rate to current CNAs with the same or more experience with Respondent (violation of Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, see Discussion and Analysis Section B);

(c) in late May or early June 2018, telling employees that if employees got rid of the Union that would free Belezarian's hands to increase CNA wages instead of having all of the money go to union delegates (violation of Section 8(a)(1) of the Act, see Discussion and Analysis Section D);

(d) in mid-June 2018, telling employees that they should not discuss their wage rates with other employees (violation of Section 8(a)(1) of the Act, see Discussion and Analysis Section D);

(e) since June 12 and 20, 2018, failing and refusing to provide information that the Union requested about bargaining unit member wage rates (violation of Section 8(a)(5) and (1) of the Act, see Discussion and Analysis Section E);

(f) on about June 21: telling employees that Belezarian wanted to pay CNAs the same base rate but could not accomplish that unless Respondent negotiated with the Union, employees signed a petition and voted the Union out, or employees resigned and

worked at the facility as employees of an outside agency (violation of Section 8(a)(1) of the Act, see Discussion and Analysis Section D); and engaging in direct dealing with employees about signing a decertification petition or resigning and working at the facility as employees of an outside agency as a means to secure their wages and benefits (violation of Section 8(a)(5) and (1) of the Act, see Discussion and Analysis Section F)

As these unfair labor practices occurred, employees became increasingly agitated in May and early June 2018, as information and rumors began to circulate about wages and bonuses. Birch began circulating the decertification petition on June 22, 2018, when tensions at the facility were peaking, and cited the wage dispute as a reason that employees should sign the petition. By June 26, 2018, fifty percent or more employees in each bargaining unit signed the petition. (FOF, Section II(K)(1), (M)(1)–(2), (O)(1), (3)–(4).)

Relying on the decertification petition, Respondent withdrew recognition of the Union on July 6, 2018. The withdrawal of recognition was effective immediately (i.e., on July 6), and Respondent notified both the Union and bargaining unit members of its decision on the same date. When Respondent withdrew recognition of the Union, the collective-bargaining agreements for the service and maintenance employees' unit and the RN unit were still in effect, as both agreements had terms that ran from November 1, 2016, to October 31, 2018. (FOF, Section II(A)(2), (T); see also FOF, Section II(U)(2) (noting that after withdrawing recognition Respondent stopped deducting union dues from employee paychecks, and stopped processing all grievances and arbitrations that the Union filed).)

3. Applicable legal standard

Under the 'contract bar' doctrine, a union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement, up to 3 years. The employer may not decline to bargain with, or withdraw recognition of, the union during that period. *Johnson Controls*, 368 NLRB No. 20, slip op. at 4 (2019); *YWCA of Western Massachusetts*, 349 NLRB 762, 763 (2007).

An employer also may not rely on a tainted decertification petition to withdraw recognition of a union. A decertification petition may be tainted in two ways. First, a decertification petition is tainted when an employer engages in unfair labor practices directly related to the employee decertification effort, such as actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of an employee petition seeking to decertify the bargaining representative. See *SFO Good-Nite Inn, LLC*, 357 NLRB at 80 (2011) (citing *Hearst Corp.*, 281 NLRB 764).

Second, a decertification petition is tainted where there is a causal connection between the decertification efforts and other unfair labor practices distinct from any unlawful assistance by the employer in the actual decertification petition. To determine whether such a causal connection exists, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency of the unfair labor practices to cause employee disaffection from the union; and (4) the

effect of the unlawful conduct on employee morale, organizational activities, and union membership. See *SFO Good-Nite Inn, LLC*, 357 NLRB at 79–80 & fn. 8 (citing *Master Slack Corp.*, 271 NLRB 78).

4. Analysis

I find that Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Union on July 6, 2018. The collective-bargaining agreements for the service and maintenance employees' unit and for the RN unit were each in effect from November 1, 2016, through October 31, 2018. Accordingly, when Respondent withdrew recognition of the Union on July 6, 2018, Respondent's action was unlawful because the Union was entitled (under the contract bar doctrine) to a conclusive presumption of majority status for each bargaining unit. Respondent therefore violated Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Union.

In finding that Respondent violated the Act when it withdrew recognition of the Union, I emphasize that this is not an "anticipatory withdrawal of recognition" case.[77] Respondent did not simply announce an intention to withdraw recognition of the Union after the contracts expired. To the contrary, Respondent withdrew recognition of the Union immediately on July 6, 2018, when the contract bar was in effect for both bargaining units. Respondent's premature action clearly was improper and unlawful.[78]

Separate and apart from the contract bar doctrine, I also find that Respondent's decision to withdraw recognition of the Union was unlawful because Respondent relied on a decertification petition that was tainted by serious unremedied unfair labor practices.[79] Specifically, over a span of 4–5 months before the decertification petition circulated, Respondent

[77] Under the anticipatory withdrawal of recognition doctrine, an employer with evidence that the union has lost majority status may inform the union that it will withdraw recognition when the contract expires, and may also refuse to bargain or suspend bargaining for a successor contract (provided that the employer announces the anticipatory withdrawal 90 days or less before the existing contract expires). However, an employer that announces such an anticipatory withdrawal must, until the contract expires, continue to recognize the union and adhere to the terms of the existing contract. *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 5, 7–8. I note that the Board did not indicate in *Johnson Controls* that a longer timeframe (such as 120 days) for anticipatory withdrawal should apply to healthcare institutions. Cf. *Trinity Lutheran Hospital*, 218 NLRB 199, 199 (1975) (holding that for healthcare institutions, decertification petitions filed more than 90 days but not over 120 days before the terminal date of the contract are timely).

[78] Relying on the Board's decision in *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982), enfd. 709 F.2d 1514 (9th Cir. 1983), Respondent asserts that notwithstanding the contract bar doctrine, an employer may withdraw recognition of a union before the contract expires if the employer does so at a time when a valid election petition can be filed (i.e., 60 to 90 days before the contract expires, or 90 to 120 days for healthcare institutions). See R. Posttrial Br. at 41. It suffices to observe that the Board in *Abbey Medical/Abbey Rents* was merely articulating guidelines for anticipatory withdrawal of recognition while a contract is in effect. See *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB at 969. Here, by contrast, Respondent actually withdrew recognition while the contracts were in effect. That action was unlawful.

[79] As previously noted, I did not find that Respondent unlawfully assisted with the decertification effort. (See Discussion and Analysis, Section H, supra.) I therefore do not rely on that theory as a basis for finding that the decertification petition was tainted.

committed several unfair labor practices (including contract modifications, unilateral changes, direct dealing and coercive statements) that fed into the same narrative: that Respondent, and not the Union, would be the one who would secure higher wages, bonuses and benefits for employees in the bargaining units. Indeed, by May/June 2018, tensions were running extremely high at the facility around the issue of employee wages – Respondent ignited and fanned the flames of those tensions by doling out wage increases and bonuses to individual employees, and by indicating that more wage increases could be on the way if the Union was out of the picture.

I find a causal connection between Respondent's unfair labor practices and the June 22–26 decertification effort. First, the timing of the violations supports causation. The violations occurred steadily over the 4–5 months leading up to the decertification petition and all related to employee wages and benefits, such that the passage of time did not dissipate the effects of the earlier violations. Second, the nature of Respondent's illegal acts were bound to have a lasting negative effect on employees and their views of the Union, insofar as Respondent repeatedly portrayed the Union as standing in the way of, or delaying, potential wage increases. As the Board has recognized, wage increases and higher bonuses are "bread and butter" issues that lead employees to seek representation – Respondent's actions and comments concerning those issues were, by their nature, coercive. And third (in reference to *Master Slack* factors three and four), Respondent's unfair labor practices had a tendency to cause employee disaffection and adversely impact employee morale and union support. Viewed together, the contract modifications concerning wages, the unilateral decisions to pay bonuses to certain employees who covered last minute open shifts and call-outs, direct dealing about bonuses and the idea of resigning to work at the facility for an outside agency, and Respondent's remarks casting the Union as an impediment to wage increases predictably undermined bargaining unit members' faith in the Union as their bargaining representative. In such circumstances, there is a causal connection between Respondent's substantial unfair labor practices and the June 22–26, 2018 decertification petition that Respondent relied upon to withdraw recognition of the Union.[80] The decertification petition is therefore tainted, and Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Union based on the tainted petition. See *Denton County Electric Cooperative, Inc. d/b/a Coserv Electric*, 366 NLRB No. 103, slip op. at 2–3, 10–12 (2018) (finding a decertification petition to be tainted by the employer's unlawful decisions to unilaterally end its practice of annual wage increases and blame the union for the lack of raises, and noting the employer's misconduct likely had a lasting effect on employees because the misconduct suggested to employees that the union was ineffective in preserving their wages); *Mesker Door, Inc.*, 357 NLRB 591, 597–598 (2011) (finding a disaffection petition to be tainted where the employer committed unfair labor practices over a 7–month period of time, the employer's conduct and actions threatened employee wages and therefore would tend to have a lasting effect, and the violations were of a type that would reasonably tend to undermine employee confidence in the union).

[80] To be sure, employees arguably had reasons to be unhappy with the Union that were independent of Respondent's unfair labor practices. (See, e.g., FOF, Section II(D), (G), (K)(2) (noting that some employees believed that union delegates acted as a clique and did not keep employees informed of Union business, and also questioned whether the Union spent dues appropriately).) Respondent's unfair labor practices, however, were a significant contributing factor to employee dissatisfaction with the Union.

K. Did Respondent Violate the Act by Threatening Employees with Unspecified Reprisals for Signing both a Document in Support of Removing the Union and a Document in Support of the Union?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, in about late June or early July 2018, threatening employees with unspecified reprisals because the employees had signed both a document in support of removing the Union as their bargaining representative and a document in support of the Union. (GC Exh. 50 (pars. 10, 31).)

2. Summary of facts

In about early July, CNA Victoria Palmer asked Belezarian if she (Palmer) could get in to trouble for signing both the June 2018 decertification petition and the counter-petition that the Union circulated afterwards. Belezarian advised Palmer that she could not get in trouble for signing or not signing a petition. (FOF, Section II(X).)

3. Applicable legal standard

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860.

4. Analysis

The General Counsel did not prove, by a preponderance of the evidence, that Respondent threatened Palmer (or any other employee) with unspecified reprisals for signing both the decertification petition and the Union's counter petition. Accordingly, I recommend that this complaint allegation be dismissed.

L. Did Respondent Violate the Act when it Suspended and Discharged Stephanie Sullivan in July 2018?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Stephanie Sullivan on about July 9, 2018, and discharging Sullivan on about July 11, 2018, because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities. (GC Exh. 50 (pars. 15, 18, 32).)

2. Summary of facts

On July 9, 2018, Respondent suspended Stephanie Sullivan, a long-time union delegate who interacted with management to handle grievances and discuss employee wages and bonuses. As its basis for the suspension, Respondent maintained that Sullivan left her work area on an

unassigned break to solicit employee Laurie Sylvia to wear a union button when Sylvia also was not on an assigned break and was in a resident area (the dining room). Sullivan denied leaving her work area on an unassigned break and asserted that she was working on the East wing at the time in question. (FOF, Section II(V)(1)–(2).)

During the investigation of the incident, Sullivan agreed to provide a written statement (and did so on July 11). Sylvia refused to provide a written statement, as did Sylvia's supervisor, Joe Little, who did not witness the incident and merely saw Sylvia upset in the dining room. Respondent did not seek clarification from Sylvia or Little, and did not approach any other employee for additional information or clarification. (FOF, Section II(V)(3)–(4).)

On July 11, 2018, Respondent discharged Sullivan, solely relying on the rationale that Sullivan left her assigned work area on an unassigned break on July 9. It was not uncommon, however, for employees to leave their assigned work areas briefly without permission, nor was it uncommon for employees to briefly engage in nonwork activities while on duty in their assigned work areas. (FOF, Section II(V)(4)–(5).)

3. Applicable legal standard

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing the employee's union or other protected activity was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. In order to meet that burden, the employer need not prove that the disciplined employee committed the misconduct alleged. Instead, the employer only needs to show that it had a reasonable belief that the employee committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. *National Hot Rod Assn.*, 368 NLRB No. 26, slip op. at 4 (2019); see also *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (noting that the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union

animus where the surrounding facts tend to reinforce that inference). A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.

4. Analysis

The General Counsel made an initial showing that Sullivan's union activities were a motivating factor in Respondent's decisions to suspend her on July 9 and discharge her on July 11, 2018. There is no dispute that Sullivan, as a union delegate, engaged in union activities, and there is no dispute that Respondent was aware of her union activities. The General Counsel also demonstrated union animus, as (among other things) only three days before Respondent suspended Sullivan, Respondent unlawfully withdrew recognition of the Union.

As an affirmative defense, Respondent asserts that it lawfully suspended and discharged Sullivan because she left her assigned work area on July 9 without permission and while not on an assigned break.[81] I do not find merit to that defense. First, I do not find that Respondent had a reasonable belief that Sullivan left her work area. Sylvia was the only witness that could have established that Sullivan left her work area, and she declined to provide a written statement to that effect. Second, Respondent made no effort to investigate Sullivan's assertion that she was working on the East wing at the time of the interaction with Sylvia. To the contrary, Respondent exaggerated the strength of its evidence against Sullivan by indicating to Sullivan that a second witness (Little) supported Respondent's position that Sullivan left her assigned work area, when Little had provided no such corroboration. And third, even if Respondent reasonably believed that Sullivan left her work area on July 9 without permission, Respondent had an established practice of tolerating similar conduct by other employees who briefly left their assigned work areas for reasons unrelated to their work duties (e.g., to socialize with other employees or managers, or to pick up a snack from the administrative offices). See *Medic One, Inc.*, 331 NLRB at 475 (noting that tolerance of behavior for which the employee was allegedly fired supports an inference of discriminatory motivation).

Ultimately, the General Counsel met its burden of proving that Respondent suspended and discharged Sullivan because of her union activities. Respondent took those actions against Sullivan, a long-time union delegate, only days after Respondent unlawfully withdrew recognition of the Union, and cited a highly suspect infraction (leaving the work area without being on an assigned break) as the basis for its decisions without conducting an adequate investigation and despite tolerating similar conduct by other employees. Based on those circumstances, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it suspended Sullivan on July 9 and when it discharged Sullivan on July 11, 2018.

[81] I emphasize that this is the only reason that Respondent proffered for suspending and discharging Sullivan. Respondent does not contend that it took action against Sullivan based on other conduct that Sullivan may have engaged in while at the facility. (See FOF, Section II(V)(1) (describing problematic conduct for which Sullivan was not disciplined).) Respondent also does not contend that Sullivan's rights to reinstatement and backpay should be limited based on other conduct that occurred before or after Respondent suspended and discharged Sullivan.

M. Did Respondent Violate the Act when it Suspended and Discharged Karen Hirst in July 2018?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Karen Hirst on about July 16, 2018, and discharging Hirst on about July 19, 2018, because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities. (GC Exh. 50 (pars. 16, 18, 32).)

2. Summary of facts

Karen Hirst worked for Respondent as a licensed practical nurse and was a long-time union delegate at who interacted with management to handle grievances and discuss employee wages and bonuses. Among other activities, on June 25, 2018, Hirst heard about the decertification petition on June 25, 2018, and responded by texting employees to express her concerns about how Belezarian was handling CNA wages. Respondent was aware that Hirst sent the text messages (having been notified by Stacy Hayes, another employee). (FOF, Section II(W)(1).)

On July 16, 2018, Respondent suspended Hirst pending investigation of a July 15, 2018 incident involving one patient hitting another patient with a doll, and the delay (by staff on duty) in reporting that incident. Hirst denied witnessing the doll incident and denied being notified of the incident on July 15 by other employees. In support of her contention, Hirst submitted a written statement explaining that she was on break with a coworker when the doll incident occurred. To demonstrate the attention that she pays to incidents of possible patient abuse (particularly in light of prior discipline that she had received), Hirst also pointed out that she reported an unrelated patient incident the same morning. (FOF, Section II(W)(5)–(6).)

Ultimately, on July 19, 2018, Respondent discharged Hirst for failing to report the July 15 doll incident. In making that decision, Respondent relied on the accounts of two witnesses, Stacy Hayes and Ariana Federici-McCarthy, who initially did not state that Hirst was notified about the incident, but during the investigation amended their statements to say that Hirst (and assistant director of nursing Katherine Minyo) were present when the doll incident occurred. Respondent did not investigate the merits of Hirst's explanation that she was on break at the time of the doll incident. (FOF, Section II(W)(6), (8)–(9).)

3. Applicable legal standard

The legal standard for evaluating whether Hirst's suspension and discharge violate Section 8(a)(3) and (1) of the Act is generally set forth in *Wright Line*, 251 NLRB at 1089. (See Discussion and Analysis, Section L(3), supra.)

4. Analysis

The General Counsel made an initial showing that Hirst's union activities were a motivating factor in Respondent's decisions to suspend her on July 16 and discharge her on July

19, 2018. Hirst was active as a union delegate, and there is no dispute that Respondent was aware of Hirst's union activities. The General Counsel also demonstrated union animus, as (among other things) only a few days before Respondent suspended Hirst, Respondent unlawfully withdrew recognition of the Union and unlawfully suspended and discharged Sullivan, another union delegate.

Respondent asserts, as its affirmative defense, that it lawfully suspended and discharged Hirst because she failed to report the July 15 doll incident and had previously been disciplined for failing to report incidents of potential patient abuse. I find that Respondent's defense falls short. Specifically, I do not find that Respondent had a reasonable belief that Hirst failed to report the doll incident. The two witnesses that Respondent relied on (Hayes and Federici-McCarthy) were simply not credible, as during Respondent's investigation, both witnesses modified their statements to indicate that Hirst knew about the doll incident and failed to report it. Indeed, Hayes went as far as to state that Minyo was also present when the doll incident occurred, notwithstanding two previous statements in which Hayes did not mention her. Moreover, Respondent did not investigate Hirst's explanation that she did not witness or hear about the doll incident because she was on break with Gomes at the time. That failure to investigate, coupled with Respondent's reliance on two witnesses with poor credibility, establishes that Respondent was more interested in discharging Hirst than it was in getting to the bottom of how the doll incident was not reported in a timely manner. See *Manor Care Health Services – Easton*, 356 NLRB 202, 204 (2010) (noting that the General Counsel may demonstrate an employer's motive to discriminate by showing that the employer failed to investigate whether an employee engaged in alleged misconduct that led to the employee being disciplined or discharged), enfd., 661 F.3d 1139 (D.C. Cir. 2011); *Medic One, Inc.*, 331 NLRB at 475 (same).

In light of the strength of the General Counsel's initial showing of discrimination (including the extensive evidence of union animus) and the failure of Respondent's affirmative defense, I find that the General Counsel demonstrated that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Hirst in July 2018 because of Hirst's union and protected activities.

N. Did Respondent Violate the Act when it Suspended and Discharged Katherine Minyo in July 2018?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by suspending supervisor Katherine Minyo on about July 16, 2018, and discharging Minyo on about July 19, 2018, because she refused to commit an unfair labor practice. (GC Exh. 50 (pars. 14, 31).)

2. Summary of facts

In 2018, Katherine Minyo worked for Respondent as the assistant director of nursing, a supervisory position. Like Hirst, Minyo was on duty on July 15, 2018, but denied being present when the patient doll incident occurred. Minyo further maintained that she was not notified of

the doll incident until she came to work on July 16, 2018. Respondent suspended Minyo on July 17, 2018, pending investigation of the doll incident and how it was reported. (FOF, Section II(W)(2), (5)–(7).)

On July 18, 2018, Belezarian telephoned Minyo to advise that Minyo would be discharged at a meeting scheduled for the following day. (According to Minyo, Belezarian also stated that Minyo could avoid termination and simply receive a written warning if Minyo admitted that she failed to report the doll incident, but Minyo refused because she did not want to lie about the incident. I did not credit that aspect of Minyo's testimony.) Respondent discharged Minyo on July 19, 2018, for failing to report the doll incident. (FOF, Section II(W)(8)–(9).)

3. Applicable legal standard

To prove that an adverse employment action violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; Respondent knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and Respondent's adverse action against the employee was motivated by the employee's protected, concerted activity. *Global Recruiters of Winfield*, 363 NLRB No. 68, slip op. at 16 (2015); *Lou's Transport, Inc.*, 361 NLRB 1446, 1447 (2014), petition for review denied 644 Fed. Appx. 690 (6th Cir. 2016); *Correctional Medical Services*, 356 NLRB 277, 278 (2010); see also *Medic One, Inc.*, 331 NLRB at 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation"). If the General Counsel satisfies the initial burden of showing of discrimination, then the burden shifts to Respondent to present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See *Global Recruiters of Winfield*, 363 NLRB No. 68, slip op. at 16; *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997).

4. Analysis

As Respondent points out (see R. Posttrial Br. at 46), there is a preliminary issue concerning whether Minyo, who all parties agree was a statutory supervisor at the time of her suspension and discharge, is protected under the Act. As a general matter, supervisors are excluded from coverage under the Act. There are some limited exceptions, however, which the Board has summarized as follows:

> The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employer's interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity – either by themselves or when allied with rank-and-file employees – is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

Parker-Robb Chevrolet, Inc., 262 NLRB 402, 404 (1982) (emphasis in original), petition for review denied 711 F.2d 383 (D.C. Cir. 1983); see also id. at 402–403.

Here, the General Counsel asserts that Respondent unlawfully discharged Minyo because Minyo refused to commit an unfair labor practice in the form of providing false information to support Respondent's decision to suspend and discharge Hirst for failing to report the July 15, 2018 doll incident. I did not find, however, that Respondent (through Belezarian or anyone else) asked Minyo to commit an unfair labor practice. My finding on that point would stand even if I credited Minyo's testimony about her July 18 telephone conversation with Belezarian, as Minyo only testified that Belezarian asked Minyo to admit that she herself failed to report the doll incident. Thus, even according to Minyo's account, Respondent did not ask Minyo to falsely implicate Hirst of wrongdoing – instead, Respondent at most asked Minyo to falsely implicate herself of wrongdoing. That set of facts does not qualify for one of the exceptions to a supervisor being excluded from the Act's protection.

The General Counsel also suggests that Respondent discharged Minyo to cover up its unlawful decision to discharge Hirst. (See GC Posttrial Br. at 103.) While that theory is arguably a better fit for the facts at hand, the Board has only recognized the theory in the narrow circumstance where, in the context of a union organizing campaign, an employer discharges a neutral employee in order to facilitate or cover up discriminatory conduct against employees who are known union supporters. See *Embassy Vacation Resorts*, 340 NLRB 846, 848 fn. 13 (2003); *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F.3d 213 (6th Cir. 1993). The Board has not extended the "cover up discharge" theory beyond that limited circumstance, let alone to an employer's decision to discharge a statutory supervisor. I therefore cannot apply that theory here.

Since Minyo was a statutory supervisor at the time of her discharge, and no exceptions apply to the general rule that statutory supervisors are excluded from coverage under the Act, I recommend that the complaint allegations concerning Minyo's July 2018 suspension and discharge be dismissed.

O. Did Respondent Violate the Act when it Disciplined and Transferred Dawn Nunes in November 2018?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by disciplining (with a final written warning) and transferring Dawn Nunes on about November 14, 2018, because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities. (GC Exh. 87 (pars. 7–9).)

2. Summary of facts

Dawn Nunes worked for Respondent as a registered nurse and began serving as a union delegate in 2015. In her capacity as a delegate, Nunes interacted with management to handle grievances and discuss employee wages and bonuses. Nunes (together with other employees) also: met with Veno and Belezarian on July 9, 2018, to voice support for the Union and

opposition to Respondent's decision to suspend Sullivan; and presented a union support petition to Belezarian on July 26, 2018. (FOF, Section II(Y)(1).)

On November 13, 2018, Respondent received written complaints from three nurses about Nunes' conduct in the workplace. The following day, Respondent reviewed the complaints against Nunes and decided (without having spoken to Nunes) to issue Nunes a final disciplinary notice and transfer her to the West wing of the facility for a 90–day monitoring period. (FOF, Section II(Y)(2)–(3).)

When Respondent met with Nunes later on November 14 to notify her of the complaints and disciplinary action, Nunes requested examples of the alleged misconduct. Respondent, through Veno, related that nurses had complained that Nunes' was "short" when she spoke with them, did not notify other nurses when she called a physician, and did not face the nurses when giving or receiving report during shift changes. Nunes objected to being transferred and given a final warning because no one had previously brought these issues to her attention. (FOF, Section II(Y)(3).)

3. Applicable legal standard

The legal standard for evaluating whether Nunes' discipline and transfer violate Section 8(a)(3) and (1) of the Act is generally set forth in *Wright Line*, 251 NLRB at 1089. (See Discussion and Analysis, Section L(3), supra.)

4. Analysis

The General Counsel made an initial showing that Nunes' union activities were a motivating factor in Respondent's decisions to issue Nunes a final written notice and transfer her to the West wing for a 90–day monitoring period. Nunes served as a union delegate, and there is no dispute that Respondent was aware of Nunes' union activities, including her continued expression of support for the Union in July 2018. The General Counsel also demonstrated union animus, as (among other things) Respondent, in July 2018, unlawfully withdrew recognition of the Union and unlawfully suspended and discharged two other union delegates (Sullivan and Hirst).

Respondent asserts, as its affirmative defense, that it lawfully disciplined and transferred Nunes based on the complaints that it received from other nurses about Nunes' conduct on the unit. I find that Respondent succeeded in establishing its affirmative defense that it would have taken the same action against Nunes even in the absence of her union and protected activities. Respondent had a reasonable belief that that Nunes engaged in misconduct based not only on the complaints from other nurses, but also on the fact that Nunes did not dispute or deny the conduct in question when Veno described the allegations against Nunes in the November 14 disciplinary meeting.[82]

[82] Nunes' tacit admission to the conduct in the workplace also undercuts any argument that the complaints against Nunes were unreliable because the complaining nurses did not support the Union.

I have considered the fact that Respondent did not speak to Nunes before deciding to take disciplinary action and thus did not fully investigate the complaints against her. While an employer who proceeds with discipline under those circumstances may be doing so at its peril, in this instance Nunes did not dispute (either in the disciplinary meeting or at trial) that she engaged in the conduct in question, and thus there was sufficient foundation for Respondent to reasonably believe that the complaints against Nunes had merit.

I also have considered the fact that the disciplinary action that Respondent took against Nunes may seem heavy handed given that Nunes was generally regarded as a good nurse, had no prior discipline and had not previously been warned or coached about her conduct in the workplace. It does not follow, however, that Respondent discriminated against Nunes by imposing a higher level of discipline. The evidentiary record does not include any evidence that Respondent treated other employees more leniently for similar workplace conduct,[83] and the examples in the trial record about general workplace misconduct by employees (e.g., name calling, profane language) are not sufficiently similar to the allegations against Nunes for me to draw any conclusions about whether Nunes' discipline was discriminatory.

In sum, the General Counsel did not meet its burden of demonstrating that Respondent disciplined and transferred Nunes for discriminatory reasons. Accordingly, I recommend that the complaint allegations about Nunes' November 14, 2018 discipline and transfer be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, since January 26, 2018, unilaterally offering and paying bargaining unit employees time and one half or double time bonuses for working last-minute open shifts and/or call-outs, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By, since January 26, 2018, bypassing the Union and dealing directly with bargaining unit employees concerning time and one half or double time bonuses for working last-minute open shifts and/or call-outs, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By, on February 20, 2018, unlawfully modifying Article 5.1 of the service and maintenance employees' collective-bargaining agreement without the Union's consent, specifically by providing higher wage rates to newly hired CNAs without providing that same higher wage rate to current CNAs with the same or more experience with Respondent, Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

[83] The General Counsel did elicit testimony that the nurse who replaced Nunes on the East wing gave and received report in a similar manner to Nunes and did not notify other nurses when she telephoned a physician. (FOF, Section II(Y)(1).) There is no evidence, however, about any complaints concerning that nurse or about how Respondent might have handled such complaints.

6. By, in late May or early June 2018, telling employees that if they got rid of the Union that would free Respondent's hands to increase CNA wages instead of having all the money go to Union delegates, Respondent violated Section 8(a)(1) of the Act.

7. By, in mid–June 2018, telling employees that they should not discuss their wages rates with other employees, Respondent violated Section 8(a)(1) of the Act.

8. By, since June 12, 2018, failing and refusing to provide the Union with information in response to the Union's verbal request for a list of all bargaining unit members and their hourly wage rates, Respondent violated Section 8(a)(5) and (1) of the Act.

9. By, since June 20, 2018, failing and refusing to provide the Union with information in response to the Union's written request for the hourly wage rates for all bargaining unit members, Respondent violated Section 8(a)(5) and (1) of the Act.

10. By bypassing the Union and dealing directly with CNAs in the bargaining unit on June 21, 2018, specifically by proposing, as a means to secure their wages and benefits, that the CNAs sign a decertification petition or resign their employment with Respondent and begin working at the facility as employees of an outside agency that would provide the same wages and benefits, Respondent violated Section 8(a)(5) and (1) of the Act.

11. By, on or about June 21, 2018, telling employees that Respondent wanted to pay CNAs the same base rate but could not accomplish that unless Respondent negotiated with the Union, employees signed a petition and voted the Union out, or employees resigned and worked at the facility as employees of an outside agency that would provide the same wages and benefits, Respondent violated Section 8(a)(1) of the Act.

12. By, on July 2 and 6, 2018, engaging in surveillance of employees involved in union activities, Respondent violated Section 8(a)(1) of the Act.

13. By, on July 6, 2018, withdrawing recognition of the Union when a contract for each bargaining unit was in effect and when the decertification petition that Respondent relied on was tainted by serious unremedied unfair labor practices, Respondent violated Section 8(a)(5) and (1) of the Act.

14. By, on about July 4 and 9, 2018, creating the impression of surveillance of union activities, Respondent violated Section 8(a)(1) of the Act.

15. By suspending Stephanie Sullivan on July 9, 2018, and by discharging Stephanie Sullivan on July 11, 2018, because of her union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

16. By suspending Karen Hirst on July 16, 2018, and by discharging Karen Hirst on July 19, 2018, because of her union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

17. By committing the unfair labor practices stated in Conclusions of Law 3–16 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

A. Remedy for Unlawful Unilateral Changes

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally offering and paying bargaining unit employees time and one half or double time for working last-minute open shifts and/or call-outs, I shall order Respondent to make bargaining unit employees whole for any losses attributable to those unilateral decisions as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), minus tax withholdings required by Federal law and the law of the Commonwealth of Massachusetts.

B. Remedy for Unlawful Contract Modifications

Having found that Respondent unlawfully modified the service and maintenance employees' collective bargaining agreement without the Union's consent (by paying higher starting wages to new CNAs without also providing that higher wage to current CNAs with the same or more experience), I shall order Respondent to restore the status quo ante and to continue in effect all terms and conditions of employment contained in the collective-bargaining agreement unless and until it bargains with the Union to agreement or impasse on different terms and conditions.

I shall also order Respondent to make whole the service and maintenance unit employees for any loss of earnings and other benefits suffered as a result of Respondent's unlawful actions. Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra, minus tax withholdings required by Federal law and the law of the Commonwealth of Massachusetts.

C. Remedy for Unlawful Withdrawal of Recognition of the Union

The Board has previously held that an affirmative bargaining order is the traditional, appropriate remedy for a Section 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.[84] *Caterair International*, 322 NLRB 64, 68

[84] If the withdrawal of recognition was unlawful solely because Respondent withdrew recognition prematurely in violation of the contract bar (i.e., without the decertification petition also being tainted),

(1996). However, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–739 (D.C. Cir. 2000). In *Vincent*, supra at 738, the court stated that an affirmative bargaining order must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representative; and (3) whether alternative remedies are adequate to remedy the violations of the Act. Although the Board has indicated that it disagrees with the requirements that the court identified in *Vincent*, the Board has followed a practice of examining whether an affirmative bargaining order is justified according to the standard set forth in *Vincent.*

Following the Board's approach, I have analyzed the facts of this case under the three-factor balancing test outlined by the U.S. Court of Appeals for the District of Columbia Circuit.

(1) An affirmative bargaining order in this case will vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representative by Respondent's withdrawal of recognition and resultant refusal to bargain with the Union. As discussed above, Respondent's own unfair labor practices contributed to the disaffection of employees from the Union and tainted the decertification petition. An affirmative bargaining order, with its attendant bar to raising a question concerning the Union's majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was unfairly deprived of an opportunity to represent members of the bargaining unit for the full two–year length of the collective-bargaining agreements (including representing members about wages), as well as the opportunity to bargain for successor agreements, it is only by restoring the status quo ante and requiring Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative free of Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective-bargaining and industrial peace. It removes Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of another decertification petition or by the prospect of an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

Board precedent indicates that an affirmative bargaining order would not be warranted. See *Burger Pits, Inc.*, 273 NLRB 1001, 1002 (1984) (finding that the employer violated Section 8(a)(5) and (1) of the Act by prematurely withdrawing recognition of the union, but declining to impose an affirmative bargaining order or extend the make-whole remedy beyond the expiration date of the contract), enfd. 785 F.2d 796 (9th Cir. 1986). Since the decertification petition here was tainted by serious unremedied unfair labor practices that Respondent committed, an affirmative bargaining order is appropriate for the reasons set forth in this section.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Respondent's withdrawal of recognition and refusal to bargain with the Union because it would permit another challenge to the Union's majority status before the taint of Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unjust in circumstances such as those here, where given the passage of time since Respondent withdrew recognition the Union needs to reestablish its representative status with unit employees. Further, Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. In such circumstances, permitting a decertification petition to be filed immediately might very well allow Respondent to profit from its own unlawful conduct. I find that those circumstances outweigh the temporary impact that the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all of the foregoing reasons, I find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case, and I shall include such an order as a remedy here.

D. Remedy for Unlawful Suspensions and Discharges

Respondent, having discriminatorily suspended and discharged Stephanie Sullivan and Karen Hirst, must offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Respondent must also make Sullivan and Hirst whole for any loss of earnings and other benefits. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra. Respondent shall also be required to expunge from its files any references to its unlawful decisions to suspend and discharge Sullivan and Hirst, and within 3 days of thereafter shall notify Sullivan and Hirst that this has been done and that the unlawful decisions will not be used against them in any way.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Sullivan and Hirst for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

E. Additional Remedies

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the

amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 1 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The General Counsel has requested, as a special remedy, that I require Respondent to have a responsible management official read the notice aloud to employees at a meeting or meetings convened for that purpose. (GC Posttrial Br. at 128.) The Board has required such a remedy where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 868.

I agree that a notice-reading remedy is justified in light of the serious and widespread impact that Respondent's unfair labor practices had on bargaining unit employees, and in light of the fact that the unfair labor practices undermined employees' confidence in the Union's ability to represent their interests. See *Denton County Electric Cooperative, Inc. d/b/a Coserv Electric*, 366 NLRB No. 103, slip op. 1 fn. 3 (finding that a notice-reading remedy was warranted based on the employer's unlawful withdrawal of recognition of the union, change in unit employees' wages without giving the union notice and an opportunity to bargain, and failure to provide relevant information in response to the union's request). Accordingly, I shall require that the remedial notice in this case be read aloud to bargaining unit members by Respondent's facility administrator or, at Respondent's option, by a Board agent in the presence of Respondent's facility administrator. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 868.

Finally, I shall grant the General Counsel's request to include per diem employees in all notice distribution requirements. The notice should be distributed to per diem employees because the evidentiary record establishes that Respondent did not consistently track when, based on the number of hours that they worked, per diem employees became members of the bargaining unit. (See FOF, Section II(C)(2), (E).)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[85]

ORDER

Respondent, NSL Country Gardens, LLC, Swansea, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[85] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Unilaterally offering and paying bargaining unit employees time and one half or double time bonuses for working last-minute open shifts and/or call-outs.

(b) Bypassing the Union and dealing directly with bargaining unit employees concerning time and one half or double time bonuses for working last-minute open shifts and/or call-outs.

(c) Modifying Article 5.1 of the service and maintenance employees' collective-bargaining agreement without the Union's consent, specifically by providing higher wage rates to newly hired CNAs without providing that same higher wage rate to current CNAs with the same or more experience.

(d) Telling employees that if they got rid of the Union that would free Respondent's hands to increase CNA wages instead of having all the money go to union delegates.

(e) Telling employees that they should not discuss their wages rates with other employees.

(f) Failing and refusing to provide the Union with information in response to the Union's requests for a list of all bargaining unit members and their hourly wage rates.

(g) Bypassing the Union and dealing directly with CNAs in the bargaining unit, specifically by proposing, as a means to secure their wages and benefits, that the CNAs sign a decertification petition or resign their employment with Respondent and begin working at the facility as employees of an outside agency that would provide the same wages and benefits.

(h) Telling employees that Respondent wanted to pay CNAs the same base rate but could not accomplish that unless Respondent negotiated with the Union, employees signed a petition and voted the Union out, or employees resigned and worked at the facility as employees of an outside agency that would provide the same wages and benefits.

(i) Engaging in surveillance of employees involved in union activities.

(j) Withdrawing recognition of the Union when a contract for each bargaining unit was in effect and when the decertification petition that Respondent relied on was tainted by serious unremedied unfair labor practices.

(k) Creating the impression of surveillance of union activities.

(l) Suspending and discharging employees because of their union and protected concerted activities.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its unlawful, unilateral decisions, made since January 26, 2018, to offer and pay bargaining unit employees time and one half or double time bonuses for working last-minute open shifts and/or call-outs, and make bargaining unit employees whole for any losses attributable to those unilateral decisions, in the manner set forth in the remedy section of this decision.

(b) Restore the status quo ante as it existed before February 20, 2018, and continue in effect all the terms and conditions of employment contained in the service and maintenance employees' collective-bargaining agreement unless and until Respondent bargains with the Union to agreement or impasse on different terms and conditions.

(c) Make whole employees in the service and maintenance employees' unit for any loss of earnings and other benefits suffered as a result of Respondent's unlawful decision to modify the service and maintenance employees' collective-bargaining agreement without the Union's consent, in the manner set forth in the remedy section of this decision.

(d) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached for either unit, embody the understanding in a signed agreement:

> Service and maintenance employees' unit: All full-time and regular part-time Licensed Practical Nurses, Nurses Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees and Laundry Employees. [The following employees are excluded from this bargaining unit: all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.]
>
> Registered nurses' unit: All full time and regular part time registered nurses. [The following employees are excluded from this bargaining unit: all other Employees, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.]

(e) Furnish to the Union in a timely manner the information about employee wage rates that the Union requested on June 12 and 20, 2018.

(f) Within 14 days from the date of the Board's Order, offer reinstatement to Stephanie Sullivan and Karen Hirst to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(g) Make Stephanie Sullivan and Karen Hirst whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful decisions to suspend and discharge Stephanie Sullivan and Karen Hirst and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

(i) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facility in Swansea, Massachusetts, copies of the attached notice marked "Appendix A."[86] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees (including per diem employees) by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees (including per diem employees) employed by Respondent at any time since January 26, 2018.

(l) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix A" shall be read to employees by Respondent's facility administrator or, at Respondent's option, by a Board agent in Respondent's facility administrator's presence.

[86] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., October 7, 2019

Geoffrey Carter
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally offer and pay bargaining unit employees time and one half or double time bonuses for working last-minute open shifts and/or call-outs.

WE WILL NOT bypass the Union and deal directly with bargaining unit employees concerning time and one half or double time bonuses for working last-minute open shifts and/or call-outs.

WE WILL NOT modify the service and maintenance employees' collective-bargaining agreement without the Union's consent.

WE WILL NOT tell employees that if they get rid of the Union that would free our hands to increase CNA wages instead of having all the money go to Union delegates.

WE WILL NOT tell employees that they should not discuss their wages rates with other employees.

WE WILL NOT fail and refuse to provide the Union with information in response to the Union's requests for a list of all bargaining unit members and their hourly wage rates.

WE WILL NOT bypass the Union and deal directly with CNAs in the bargaining unit, specifically by proposing, as a means to secure their wages and benefits, that the CNAs sign a decertification petition or resign their employment and begin working at the facility as employees of an outside agency that would provide the same wages and benefits.

WE WILL NOT tell employees that we want to pay CNAs the same base rate but cannot accomplish that unless we negotiate with the Union, employees sign a petition and vote the Union out, or employees resign and work at the facility as employees of an outside agency that would provide the same wages and benefits.

WE WILL NOT engage in surveillance of employees involved in union activities.

WE WILL NOT withdraw recognition of the Union when a contract for each bargaining unit is in effect and when the decertification petition that we relied on is tainted by serious unremedied unfair labor practices.

WE WILL NOT create the impression of surveillance of union activities.

WE WILL NOT suspend and/or discharge employees because of their union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our unlawful, unilateral decisions to offer and pay employees time and one half or double time bonuses for working last-minute open shifts and/or call-outs, and WE WILL make bargaining unit employees whole for any losses attributable to those unilateral decisions.

WE WILL restore the status quo ante of the service and maintenance employees' collective-bargaining agreement (as it existed before February 20, 2018), and WE WILL continue in effect all the terms and conditions of employment contained in the service and maintenance employees' collective-bargaining agreement unless and until we bargain with the Union to agreement or impasse on different terms and conditions.

WE WILL make whole employees in the service and maintenance employees' unit for any loss of earnings and other benefits suffered as a result of our decision to modify the service and maintenance employees' collective-bargaining agreement without the Union's consent.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached for either unit, embody the understanding in a signed agreement:

> Service and maintenance employees' unit: All full-time and regular part-time Licensed Practical Nurses, Nurses Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees and Laundry Employees. [The following employees are excluded from this bargaining unit: all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.]
>
> Registered nurses' unit: All full time and regular part time registered nurses. [The following employees are excluded from this bargaining unit: all other Employees,

Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.]

WE WILL furnish to the Union in a timely manner the information about employee wage rates that the Union requested on June 12 and 20, 2018.

WE WILL offer reinstatement to Stephanie Sullivan and Karen Hirst to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Stephanie Sullivan and Karen Hirst whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any references to the unlawful decisions to suspend and discharge Stephanie Sullivan and Karen Hirst and, within 3 days thereafter, WE WILL notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

NSL COUNTRY GARDENS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

10 Causeway Street, 6th Floor, Boston MA 02222-1072

(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-223025 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (857) 317-7816.

APPENDIX B
Corrections to Transcript
NSL Country Gardens, LLC, 01–CA–223025

Transcript Page:Line	Transcript Correction
12:24	"SCIU" should be SEIU"
76:3	"deferential" should be "differential"
187:16	"employer" should be "employee"
226:6	"change" should be "chance"
316:2	"severed" should be "served"
325:1	one of the attorneys was the speaker
345:24	"pose" should be "pose your objection"
496:2–3	"filed" should be "followed"
606:8–9	"Mr." should be "Ms."
723:4	"tired" should be "tied"
746:19	"Natalie" should be "Mallory"
750:13	"out" should be "our"
754:2	"GC-FF-6" should be "GC-SS-6"
765:23	"GC-FS-6" should be "GC-SS-6"
784:4–5	"There's a separate compliance. That" should be "There's a separate compliance proceeding that"
785:23	"one" should be "on"
825:11	"threat" should be "thread"
829:18	"like" should be "line"
861:15	"one" should be "none"
876:25	"you" should be "your"
883:16	"Viloa" should be "Viola"
897:5	"39" should be "30"
914:25	Attorney Fein was the speaker
915:2, 6	Attorney Fein was the speaker
1001:2	"nickle" should be "nickel"
1046:14	"time" should be "type"
1083:16	"that's the" should be "that's not the"
1110:1	"he" should be "she"
1152:6	"series" should be "serious"
1237:21	"lover" should be "love"
1293:21	"addition" should be "additional"
1323–1339: throughout	"Reeves" and "Reese" should be "Reis"
1333:5, 8	"set of questions" should be "set up question"
1337:10	"rational there for" should be "rationale therefor"
1338:13	"30th" should be "13th"
1360:19	"online" should be "underlying"
1385:3	"Beledarian" should be "Belizaire"
1390:7	"Beledarian" should be "Belizaire"
1408:5	"priors" should be "flyers"

Transcript Page:Line	Transcript Correction
1545:12	“rate” should be “rat”
1743:18	“What” should be “With”
1748:10	“he” should be “her”
1958:19	“employees” should be “and employees are”
1959:2	“situations” should be “stipulations”
1980:2	“Terrell” should be “Teoli”
1981:16, 19	“did not the” should be “did not like the”
2026:7	“discussion” should be “discuss”
2041:22	“adds” should be “ads”
2060:15	“where” should be “were”
2095:15	“day” should be “say”
2165:4	“hear” should be “here”
2217:5	“Birth” should be “Birch”
2223:18	“Hewitt” should be “Hirst”
2241:25	“too” should be “took”
2831:10	“event” should be “even”
2477: 6–7, 9, 22	“personnel” should be “personal”
2483:7	“verse” should be “versus”
2492:18	“Erin” should be “Aaron
2500:19	“tern” should be “term”
2502:1	“dipsy” should be “disciplinary”
2557:24	“buy” should be “by”
2562:19	witness Joseph Veno was the speaker
2576:8, 12, 20	“Reece” should be “Reis”
2577:10	“Reece” should be “Reis”
2586:8	“not” should be “no”